UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NOS. 19-1586
19-1640

PROJECT VERITAS ACTION FUND,
Plaintiff-Appellee / Cross-Appellant

v.

RACHAEL S. ROLLINS, IN HER OFFICIAL CAPACITY AS DISTRICT ATTORNEY FOR SUFFOLK COUNTY,
Defendant-Appellant / Cross-Appellee

NO. 19-1629

K. ERIC MARTIN & RENE PEREZ,
Plaintiffs-Appellees

v.

RACHAEL S. ROLLINS, IN HER OFFICIAL CAPACITY AS DISTRICT ATTORNEY FOR SUFFOLK COUNTY,
Defendant-Appellant

WILLIAM G. GROSS, IN HIS OFFICIAL CAPACITY AS POLICE COMMISSIONER FOR THE CITY OF BOSTON,
Defendant

ON APPEAL FROM JUDGMENTS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

PRINCIPAL BRIEF OF DISTRICT ATTORNEY RACHAEL S. ROLLINS

August 21, 2019

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JURISDICTIONAL STATEMENT

The defendant, District Attorney Rachael Rollins, has noticed two appeals (nos. 19-1629 and 19-1640) from two related judgments of the District Court (Saris, C.J.). The District Attorney disputes the federal courts' Article III jurisdiction over these cases because the claims do not present a case or controversy that is ripe for adjudication. See pp. 23-36 below. Nonetheless, the plaintiffs' claims fell within the District Court's statutory jurisdiction because each arose under the federal Constitution, 28 U.S.C. § 1331, and these appeals fall within this Court's statutory jurisdiction because each arises from a final judgment of the District Court, 28 U.S.C. § 1291. The appeals are timely because the District Court entered judgment on May 22, 2019, and the District Attorney noticed each appeal thirty days later, on June 21, 2019. A. 13-14, 735-36.[1]

ISSUES PRESENTED

The District Court granted summary judgment for the plaintiffs, declaring that Massachusetts General Laws c. 272, § 99 (the "Anti-Wiretap Statute"), violates the First Amendment insofar as it prohibits nonconsensual surreptitious audio recording of "government officials," including law enforcement officers, discharging their duties in "public spaces." Although the District Attorney

[1] This brief cites the Appendix as "A. [page number]" and the addendum to the brief as "Add. [page number]."

recognizes and appreciates the tremendous value of the First Amendment, particularly as it relates to public scrutiny of government affairs, she also recognizes that covert recording of government employees' interactions, even in public settings, could pose real risks of harm, including to unwitting third parties. These appeals from the District Court's judgments thus present the following questions:

1. Whether the plaintiffs' claims present an actual case or controversy that is ripe for adjudication.

2. Whether, if the plaintiffs' claims are justiciable, the District Attorney is entitled to an award of summary judgment.

STATEMENT OF THE CASE

Facts

The Massachusetts Anti-Wiretap Statute Prohibits Nonconsensual Surreptitious Audio Recording

In 1968, amid widespread public concern over the threat to citizens' privacy posed by new eavesdropping technologies, the Massachusetts Legislature enacted the Anti-Wiretap Statute. See generally Mass. St. 1968, c. 738. It was not the Commonwealth's first attempt to regulate eavesdropping; to the contrary, it capped nearly a half-century of policy experimentation. In 1920, the Legislature had enacted a limited statute that forbade the use of certain devices to "secretly

overhear[] . . . spoken words in any building . . . ."[2] Mass. St. 1920, c. 558. And, in 1959, the Legislature had replaced the 1920 statute with a provision that broadly banned the recording of "any spoken words at any place," but exempted recordings made with the consent of any party to the communication (commonly known as a "one party consent" provision). See Mass. St. 1959, c. 449. But the 1959 statute must have quickly proven unsatisfactory because, a scant five years later, the Legislature created a commission to study the issue "with a view to strengthening the laws relative to eavesdropping and the use of wire tapping recording devices." Mass. Res. 1964, c. 82.

That commission consisted of legislators and members of the public including William P. Homans Jr., a leading civil rights attorney. See generally Mark S. Brodin, William P. Homans Jr.: A Life in Court (Vandeplas Publ'g 2010). In April 1967, it published an interim report that described the wide availability of surreptitious recording devices and advocated "lessen[ing] the incidence of eavesdropping." 1967 Mass. Senate Rep. No. 1198 at 3-4, 14-15. In June 1968, it published a second report that recommended, among other things: (1) continuing to apply the recording prohibition to a broad range of communications; and (2)

[2] In addition to limiting its coverage to "spoken words in any building," the 1920 statute applied only where a person made a recording with the intent "to procure information concerning any official matter or to injure another," and also exempted recordings made by a person who was "on premises under his exclusive control." Mass. St. 1920, c. 558.

replacing the 1959 statute's "one party consent" provision with an "all party consent" provision applicable to "secret[]" recordings. 1968 Mass. Senate Rep. No. 1132 ("1968 Commission Report") at App'x A. A concurring report signed by commissioners Homans and Elliot Cole elaborated on the reason for the "all party consent" recommendation: Each individual, they wrote, must be allowed "to decide for himself whether his words shall be accessible solely to his conversation partner, to a particular group, or to the public, and, a fortiori, whether his voice shall be fixed on a record." Add. 25 (1968 Commission Report at 12).

The Legislature, in enacting the Anti-Wiretap Statute in July 1968, adopted not only the commission's "all party consent" recommendation, but also its recommendation that the prohibition be limited to "secret[]" recordings. Mass. St. 1968, c. 738; Mass. G.L. c. 272, § 99(B)(4). As enacted, the Anti-Wiretap Statute prohibits, and sets out criminal penalties for, willfully committing, attempting to commit, or procuring another person to commit an "interception," defined as the use of an "intercepting device" to "secretly hear, secretly record, or aid another to secretly hear or secretly record" an "oral" or "wire communication" without "prior authority by all parties to such communication." Mass. G.L. c. 272, § 99(B)(4) & (C)(1). The Legislature declared that "the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to

the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited." Id. § 99(A).

The Anti-Wiretap Statute was one among many anti-eavesdropping statutes enacted by various jurisdictions around that time, some (but not all) of which included an "all party consent" provision and some (but not all) of which differentiated between open and surreptitious manners of recording. But Massachusetts' statute was unusual in that it premised the application of its "all party consent" requirement on the recording's being made surreptitiously.[3] Compare, e.g., 18 U.S.C. § 2511 (prohibiting interception of communication without consent of at least one party, regardless of whether interception is open or surreptitious). Although this approach effected "a more restrictive electronic surveillance statute than comparable statutes in other States" by applying an "all party consent" requirement to all surreptitious recordings without exception, Commonwealth v. Hyde, 434 Mass. 594, 599, 750 N.E.2d 963, 967 (2001), it also effected a more permissive policy than many others by placing no limitations

[3] In 2016, Oregon joined Massachusetts in part by applying a similar policy to recordings of conversations in which a law enforcement officer participates. See Or. St. 2015, c. 553, codified at Or. Rev. Stat. § 165.540(5)(b) (general statutory all-party notification requirement does not apply to recording of such conversations if recording is "made openly and in plain view of the participants in the conversation").

whatsoever on recordings made openly and in plain view. Id. at 605, 971; Commonwealth v. Rivera, 445 Mass. 119, 833 N.E.2d 1113 (2005).

This Court Recognizes a First Amendment "Right to Openly Record" in Some Factual Circumstances

In the 2011 case of Glik v. Cunniffe, this Court recognized a First Amendment "right to openly record" in some factual circumstances. 655 F.3d 78, 85 (1st Cir. 2011). There, Simon Glik recorded Boston Police officers making an arrest on Boston Common. Id. at 80. He made his recording openly, "from a comfortable remove," and with the officers' knowledge, but he was nonetheless arrested and charged with violating the Anti-Wiretap Statute. Id. That charge was promptly dismissed, and he sought damages against the officers for violating his First Amendment rights. Id.

On appeal from the District Court's denial of qualified immunity, this Court held that Glik's right to make his recording was indeed protected by the First Amendment and was clearly established at the time of his arrest on October 1, 2007. Id. at 85. The Court reasoned that "[f]reedom of expression has particular significance with respect to government"; that "[g]athering information about government officials in a form that can readily be disseminated . . . serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs"; and that police officers, in particular, are "expected to endure significant burdens." Id. at 82, 84. The Court noted that a right to record

"is not without limitations. It may be subject to reasonable time, place, and manner restrictions." Id. at 84. But, in view of the facts that Glik had recorded the officers on Boston Common, "the apotheosis of a public forum," and had done so peacefully and without interfering with the officers, the Court declined to explore those limitations. Id.

Although Each Plaintiff Has Made Recordings in the Past, No Plaintiff Articulates a Concrete Plan to Make Any Prospective Surreptitious Recording in Massachusetts

A. Project Veritas Action Fund

Plaintiff Project Veritas Action Fund, Inc. ("PVA") and Project Veritas, Inc. ("Project Veritas") are separate entities, but their personnel, facilities, and methods are one and the same.[4] A. 336, 407, 415, 467-68. Both are in the business of undercover journalism, defined as "secretly record[ing] people." A. 468-69.

1. Deciding to Investigate and Developing a Cover Story

PVA and Project Veritas conduct investigations into suspected "fraud, abuse of power, [and] lapses of ethics." A. 397. Once an investigation has been initiated and assigned to a member of their shared journalistic staff, the assigned journalist researches ways to "gain access" to the target of the investigation. A. 407-09. To do so, the journalist develops a "cover story"—a name and background story that

[4] Many of the recited facts concerning PVA were revealed by the testimony of witnesses who were designated to testify on PVA's behalf pursuant to Federal Rule of Civil Procedure 30(b)(6). See A. 509-16 (PVA's witness designations).

she will adopt to approach the target and "ingratiate [herself] with the [target] so that they can trust you." A. 258, 407-09, 471-72.

The "cover story" is not necessarily true; in fact, it is "rarely" true. A. 254-55, 409. But PVA / Project Veritas may take extensive measures to make it appear to be true, including: creating an e-mail account, Facebook page, LinkedIn page, or website; printing business cards; creating a new business entity or financial account; or making a financial contribution to the target organization. A. 278-79, 288-90, 475-80. "Cover stories" used by PVA / Project Veritas have involved:

- Seeking to volunteer for a targeted political campaign, A. 293-95, 307, 443-45;
- Seeking to obtain an internship with a targeted organization, A. 258-59, 271-77, 279-80, 452-55, 488-91;
- Posing as a potential donor interested in making a financial contribution to a targeted organization, knowing that, "if we dangled the carrot of a donation to this political organization they would be very nice to us," A. 266-68, 477-78;
- Posing as an aspiring educator at the bar at a teacher's union conference, on the belief that, if a young woman "sit[s] at the bar and you dress nice and you look nice and you talk to people and you're alone, men will talk to you," A. 370-71; and
- Encouraging a target's romantic feelings for the journalist. A. 309-30; see A. 330 ("Our objective . . . is to have conversations and encounters and relationships with the people that we're investigating. So, if that person thinks that [PVA's journalist] is attractive and wants to spend time with [her] because they're attracted, great, that's all good for us.").

2. Conducting the Investigation In the Field

PVA / Project Veritas journalists do almost all of their field work using the alias and cover story, rather than a true identity. A. 412-13. The effect of this is to deceive the target. A. 471-72. In the field, PVA / Project Veritas journalists seek to boost the ego of the target, including by flattering the target and claiming to be familiar with the target's achievements, even if they are not. A. 261-62.

Meanwhile, the hidden recording devices are rolling. A. 414. In the field, the PVA / Project Veritas staff has access to "as sophisticated equipment as we could possibly get," including hidden necktie cameras, purse cameras, eyeglass cameras, and cameras the lens of which fit into a button or rhinestone. A. 286-87, 415-16. When a PVA / Project Veritas journalist meets with a target for the purpose of surreptitiously recording him or her, other PVA / Project Veritas staff members may station themselves nearby, their affiliation with PVA / Project Veritas unknown to the target. A. 268-69, 331-33.

But, notwithstanding her preparatory research, when a PVA / Project Veritas journalist goes into the field, she does not know whom she might surreptitiously record, where she might make such a recording, nor what she might ultimately record. A. 263-65, 363-65, 371-72. In the past, some of PVA's and Project Veritas' field investigations resulted in the following:

- Journalists posing as campaign volunteers have surreptitiously made audio and video recordings within the campaign office, sometimes while actively

participating in staff meetings or engaging fellow volunteers. A. 291-93, 296-98, 442-47.

- Journalists posing as interns have surreptitiously made audio and video recordings within the target's office of the target's personnel and activities. A. 281-85, 452-55, 533.

- Journalists posing as prospective donors have surreptitiously made audio and video recordings of their meetings with representatives of the target organization.[5] A. 265-71, 532; A. 534 ("15-P27 Rigging the Election[] .mp4" at 00:18 - 00:24); A. 535 ("17I NPR[].mp4" at 01:35 - 10:54).

- The journalist posing as an aspiring educator at the bar at the teacher's union conference surreptitiously made audio and video recordings of Steve Wentz, a teacher from Kansas, who told her a story about how he once offered to fistfight a wayward student. A. 378-79; A. 534 ("confidential - FNOE0239_ 20150628192900.mp4" at 00:00 - 09:36). Wentz went on to reveal, in the same uninterrupted monologue, that his offer was a "tool" to reach the student in an attempt to "be real," and that he contemporaneously had told the student that, "[i]f you work hard in here, I will walk through fire for you." Id.

- The journalist posing as a romantic interest surreptitiously made audio and video recordings of "dates" with the target, including one at a restaurant and one at Yankee Stadium. A. 321-25, 524-25.

3. Editing, Producing, and Publishing the Video Report

For both PVA and Project Veritas, the finished product is a fully-produced "video report" that is released to the public. A. 252, 398-99. Underlying that

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[5] This fact, and several others cited in this brief, is supported by the contents of a video file contained on a disc that was manually filed in the District Court.

Where, as in the passage accompanying this footnote, this brief recites a fact that is supported by such a video file, the brief cites the page of the Record Appendix that documents the submission of the disc containing that file, as well as the name (and, if appropriate, the pinpoint timestamp) of the specific video file.

The parties to these appeals expect to file a joint motion with this Court requesting that the relevant physical discs be transferred from the District Court.

report is the unedited "raw video" surreptitiously captured in the field. A. 252-53, 399. The journalist typically captures much more raw video than will be included in the video report and, "[w]hen [PVA] put[s] together the final production, we leave out a lot of stuff." A. 308, 399. For example, Project Veritas edited and published a video that included part of the surreptitious recording its journalist had made of Wentz at the bar. A. 374-79; A. 534 ("17K Teachers Union President[].mp4" at 00:03 - 00:35, 02:09 - 03:40). Although Wentz's remarks about offering to fistfight the wayward student were featured in the video report, his statements that his offer was a "tool" to reach the student in an attempt to "be real," and that he contemporaneously had told the student that, "[i]f you work hard in here, I will walk through fire for you," did not appear in the video report. Id.

When a video report is fully produced, PVA / Project Veritas releases it to the public by publishing it on its website and/or YouTube channel. A. 419-20, 472. It is the policy of both PVA and Project Veritas not to release raw video underlying a published video report. A. 421-22.

4. PVA's Inchoate Plans to Make Prospective Surreptitious Recordings in Massachusetts

PVA testified, through its designated witness, see A. 510-11, that it has no present intention to surreptitiously record, in Massachusetts, any particular person, in a particular place, in a particular way, doing or saying a particular thing. A. 366-67. Indeed, PVA's testimony emphasized how its journalists in the field

cannot predict whom they might surreptitiously record, where they might make such a recording, nor what they might ultimately record. A. 263-65, 363-65, 371-72; see A. 277 ("[S]o much of this . . . is [']one thing leads to another.['] I don't think we ever have some grand master plan."). PVA has not taken any concrete steps toward making prospective surreptitious recordings in Massachusetts, aside from engaging in litigation and monitoring things it would surreptitiously record in Massachusetts if permitted to do so. A. 492-93, 520.

PVA previously perceived several opportunities to make surreptitious recordings in Massachusetts, including in connection with putative investigations into officials of the Massachusetts Education Association and officials of Harvard University. A. 342, 493-503, 519-20. Each perceived opportunity, except one, involved neither a specific person to be recorded nor a specific place where the recording was to be made. A. 352-53, 355-57, 362, 364-65, 429-30, 433, 449-50, 503-05. In the final instance, the target of the surreptitious recording was to be the mother of an employee of the New York Times, but no specific plan was made to approach her, no specific place was identified to encounter her, and PVA does not know whether any resulting recording of her would have been made in circumstances lacking a reasonable expectation of privacy. A. 336, 339-41. PVA testified, through its designated witness, see A. 510-11, that it has no present intention to pursue any of these opportunities. A. 349.

B. Eric Martin and His Inchoate Plans to Make Prospective Surreptitious Recordings in Massachusetts

Plaintiff K. Eric Martin is a resident of Boston who, by his description, seeks to hold police officers accountable for their actions. A. 789, 880.

Martin has openly recorded a police officer in Massachusetts on some thirty occasions, many of which have depicted the officer interacting with a third party. A. 792-93, 882-85. When he has recorded an interaction between an officer and a third party, Martin commonly has not known the third party or the nature of the interaction before beginning to record. A. 807-08, 809, 811-12, 813-15, 832-34, 867-69, 897. In addition, when recording a police officer, Martin has sometimes recorded, without permission, the oral statements of unknown passers-by who were not interacting with the officer.[6] A. 810-11, 896; A. 993-98 & Add. 62-64; A. 894 ("MARTIN0000028.mov"; "MARTIN0000032.mov" at 00:29 - 00:34; "MARTIN0000034.mov" at 00:34 - 00:47). At least one of Martin's recordings

[6] This fact, along with several others, was inferred by the District Court after Martin asserted a Fifth Amendment privilege to refuse to answer certain deposition questions. See A. 815-31, 835-44 (relevant portions of Martin's deposition); A. 993-98 (District Attorney's motion requesting specific adverse inferences); A. 1366-69 (Martin's response declining to contest most of the requested inferences); Add. 62-64 (District Court's opinion allowing the motion as to the uncontested inferences). The District Court's allowance of the District Attorney's motion merged into its judgment, and Martin has not appealed from that judgment.

Where, as in the passage accompanying this footnote, this brief recites a fact that is supported by an inference drawn by the District Court, the brief cites both the District Attorney's motion for adverse inferences and the District Court's opinion allowing that motion.

has captured communications of people interacting with a police officer inside of a restaurant while Martin stood on the sidewalk outside. A. 993-98 & Add. 62-64; A. 894 ("MARTIN0000027.mov" & "MARTIN0000028.mov").

Martin believes that the opportunity to surreptitiously record a police officer might arise at any time, in any number of situations, and in any number of public places. A. 858-59. He wishes to surreptitiously record one-on-one interactions that he initiates with a police officer and conversations that involve a plainclothes officer. A. 853-55, 881-82, 887-88. But Martin has no present intention to surreptitiously record, in Massachusetts, a police officer, in a particular place, saying or doing a particular thing, while making the recording in a particular manner. A. 860. Indeed, he has no present intention to surreptitiously record a police officer in public at all. A. 860-63, 877. Nor has he taken any steps to surreptitiously record a police officer in public, aside from engaging in litigation and regularly carrying a telephone equipped to make recordings. A. 860, 862, 891.

C. Rene Perez and His Inchoate Plans to Make Prospective Surreptitious Recordings in Massachusetts

Plaintiff Rene Perez is a resident of Boston and, by his description, a civil rights activist. A. 913-14.

Perez has openly recorded a police officer in Massachusetts on some eighteen occasions. A. 962-63. Most of Perez's past recordings have been occasioned by demonstrations or protests. Id. Perez began to participate in such

protests in 2003 and continued to do so through 2015. A. 915-17. While participating in those protests, Perez routinely recorded the police and "livestreamed" his recordings by broadcasting them on the internet at the same time he was making them. A. 918-20, 922-24; see, e.g., A. 972 ("PEREZ0000009.mp4" at 07:03 - 07:49). He did so to document the police's location(s), and he sent out a Tweet every time he did so. A. 919. On one occasion, while participating in a march that descended a ramp and entered the roadbed of the Massachusetts Turnpike, Perez was told by a police officer to "turn around and keep going" but, after taking several backward steps in the direction indicated by the officer, walked back toward the officer's location. A. 931-37; A. 972 ("PEREZ0000003.mp4" at 00:15 - 00:50). On another occasion, Perez remained behind after a protest outside the home of then-Secretary of State John Kerry had ended and, when a police officer sought to disperse two other stragglers, Perez began to record the encounter and physically inserted himself between the officer and the two stragglers. A. 938-43, 974; A. 972 ("PEREZ0000006.mp4").

Perez believes that the opportunity to surreptitiously record a police officer might arise at any time, at any place, and in any number of situations. A. 944-45. Indeed, Perez could not identify any circumstance in which he would not surreptitiously record police officers in public in the course of their duties, A. 956-57, and declined to rule out surreptitiously recording where:

- The conversation involves a third party's interaction with a police officer and Perez does not know the third party or the nature of the interaction before beginning to record, A. 959-60;
- The conversation involves a plainclothes officer, A. 946-47;
- The conversation appears to be confidential, A. 948;
- The conversation discloses personal identifying information, id.;
- Perez denies that he is making a recording, A. 948-49;
- Perez makes the recording using sound-amplifying equipment, A. 950;
- Perez initiates the conversation with a police officer, A. 965;
- Perez intrudes on an officer's conversation with a third party. A. 959-60.

Perez also testified that he would livestream any surreptitious recording of a police officer that he might make. A. 950.

But Perez has no present intention to surreptitiously record, in Massachusetts, a particular police officer, in a particular place, saying or doing a particular thing. A. 958. Indeed, he has no present intention to surreptitiously record, in Massachusetts, police officers at all. A. 955. Nor has he taken any steps to surreptitiously record a police officer in Massachusetts, aside from engaging in litigation and regularly carrying a telephone equipped to make recordings. A. 954-55, 958, 969-70.

Procedural History

PVA Challenges the Anti-Wiretap Statute's Prohibition on Surreptitious Recording with Respect to (1) Government Officials in Public Places and (2) Any Communication Made Without a Reasonable Expectation of Privacy

On March 4, 2016, PVA filed a complaint alleging that the Anti-Wiretap Statute contravenes the First Amendment insofar as it prohibits both: (1) the nonconsensual surreptitious recording of "government officials engaged in their duties in a public place"; and (2) the nonconsensual surreptitious recording of communications (including by a person other than a government official) that "occur in circumstances with no reasonable expectation of privacy." A. 1, 22-23. PVA also challenged the Anti-Wiretap Statute as facially overbroad. A. 21-24.

On March 23, 2017, the District Court granted the District Attorney's motion to dismiss PVA's complaint. A. 5, 68-87. With respect to PVA's claim concerning communications made without a reasonable expectation of privacy, the District Court found that, "while the reasonable expectation of privacy standard for defining oral communications might be the least restrictive alternative, that approach is not required under intermediate scrutiny when the privacy of individual conversations is at stake." A. 84. The District Court also rejected PVA's facial overbreadth claim in view of the Anti-Wiretap Statute's "wide range of legitimate applications." A. 86. And it found PVA's allegations in support of

its claim concerning government officials to be "too vague," but granted PVA leave to re-plead that claim. A. 76.

PVA accepted the District Court's invitation to re-plead, A. 5, 88-101, and the District Attorney moved to dismiss its First Amended Complaint. A. 7, 102-03. The District Court again dismissed PVA's complaint, this time on justiciability grounds, finding PVA's allegations about its prospective surreptitious recordings in Massachusetts to be "too vague and conclusory to pass muster." Add. 36-37. PVA then filed a Second Amended Complaint reiterating its claim concerning nonconsensual surreptitious recording of "government officials engaged in their duties in a public place."[7] A. 8, 117-31 (operative complaint). That complaint was the subject of the cross-motions for summary judgment discussed below.

Martin and Perez Challenge the Anti-Wiretap Statute's Prohibition on Surreptitious Recording with Respect to Police Officers in Public Places

On June 30, 2016, Martin and Perez filed a complaint alleging that the Anti-Wiretap Statute violated the First Amendment by prohibiting the nonconsensual surreptitious recording of police officers engaged in their official duties in public

[7] PVA's Second Amended Complaint also reiterated its previously-dismissed claims concerning facial overbreadth and nonconsensual surreptitious recording of communications lacking a reasonable expectation of privacy. A. 117-31. The District Court noted in its memorandum on the parties' cross-motions for summary judgment that it had "already rejected" those claims. Add. 71.

places.[8] A. 720, 737-55. After the District Attorney's motion to dismiss was denied, see A. 721, 724, the action proceeded to discovery.

The District Court Grants Summary Judgment for All Plaintiffs, But Declines to Define the Scope of the Relief It Awards

After discovery in both cases was complete, each party in each case sought summary judgment.[9] A. 10-12, 140-41, 238-40, 729-30, 776-78, 1001-03. The District Attorney also moved to dismiss each case, arguing that the legal and factual contours of each plaintiff's claim were so nebulous as to present no justiciable case or controversy under Article III. A. 11, 234-36, 729, 774-75.

After a consolidated hearing on all of those motions, the District Court on December 10, 2018, concluded that: (1) each plaintiff's claim is justiciable; and (2) the Anti-Wiretap Statute contravenes the First Amendment "insofar as it prohibits audio recording of government officials, including law enforcement officers, performing their duties in public spaces . . . ." Add. 82. The District Court's conclusion as to the merits thus resolved both: (1) Martin's and Perez's claim regarding nonconsensual surreptitious recording of police officers in public places; and (2) PVA's claim regarding nonconsensual surreptitious recording of

[8] That complaint named the Boston Police Commissioner as a co-defendant. A. 740. The Commissioner has not appealed from the District Court's judgment.

[9] The District Attorney's motion papers seeking summary judgment against Project Veritas were initially filed under seal pursuant to the terms of a protective order agreed-to by the parties and the District Court. See A. 11, 236-37. The same papers were subsequently filed on the District Court's public docket. A. 11-12.

government officials in public places. The District Court, however, expressly declined to define "what constitutes a 'public space' and who is considered a 'governmental official,'" deeming it "not prudential, under the ripeness doctrine, to do so" and choosing instead to "leave[] it to subsequent cases to define these terms on a better record." Add. 80-82.

The District Court ordered the parties to propose a form of injunction. Add. 83. In response, the District Attorney, reserving all appellate and other rights, suggested that the District Court award any relief in the form of a declaration rather than an injunction, and also proposed language for a declaration that sought to define the terms "government official" and "public space," and to affirm that the First Amendment does not protect the surreptitious recording of a person who is not a government official, including a private party who happens to interact with a government official in a public space. A. 696-705. On May 22, 2019, the District Court agreed to enter a declaration but stated that it "will not . . . give either 'public space' or 'government official' definitions." Add. 92. The District Court also declined to affirm that the First Amendment does not protect the surreptitious recording of such private parties. Id. The District Court entered judgment in each case, Add. 94-95, and these appeals followed.

SUMMARY OF ARGUMENT

The District Court declared that this Court's reasoning in Glik—recognizing a First Amendment right to openly record a police officer, from a distance, as the officer performed his duties on Boston Common—requires Massachusetts' Anti-Wiretap Statute to be struck down as to all surreptitious recordings made of a "government official" discharging his duties in a "public space," regardless of whether the recording also captures nonconsenting private persons. The District Court so held even though the record reveals that no plaintiff can identify any particular circumstances in which it might make a surreptitious recording in Massachusetts, and, indeed, that no plaintiff has any present intention to make a particular future surreptitious recording in Massachusetts.

The lack of concrete facts around the plaintiffs' claims makes these cases unripe and inappropriate for federal adjudication. The decisions of this Court and other federal courts recognizing a "right to openly record" reveal that right to depend on the factual circumstances surrounding a particular open recording. Moreover, no court in the country has previously recognized a "right to surreptitiously record"—let alone done so without regard to the factual circumstances surrounding a particular surreptitious recording. In the absence of any such particular facts, the plaintiffs' claims of a blanket "right to surreptitiously record" all government officials in all public spaces can be adjudicated only

through speculation, abstraction, and hypothetical facts—that is, through an impermissible advisory opinion. Further, the lack of definition around the plaintiffs' claims means that much future litigation would be needed to explore the boundaries of any abstract declaration of a "right to surreptitiously record," a consequence that the District Court explicitly acknowledged as it declined to define in any detail who qualifies as a "governmental official" or what qualifies as a "public space" under the terms of its declaratory judgment.

Alternatively, if the plaintiffs' claims are justiciable, the District Attorney is entitled to an award of summary judgment.

First, the plaintiffs cannot show that the Anti-Wiretap Statute lacks a "plainly legitimate sweep" within the scope of their claims, as is required to satisfy the standards for a facial constitutional challenge. The District Court improperly relieved them of their burden to make that showing, instead appearing to place a burden on the Commonwealth to prove that every possible application of the statute is constitutional. Moreover, the District Court applied "time, place, or manner" intermediate scrutiny, applicable only in traditional and designated public fora, indiscriminately to entire scope of the plaintiffs' claims, even though the plaintiffs also claimed a right to surreptitiously record in non-public fora (where First Amendment scrutiny is simply for reasonableness) or on publicly-accessible private property (where no First Amendment scrutiny attaches).

Second, the Anti-Wiretap Statute withstands intermediate scrutiny. The Commonwealth has a significant interest in ensuring that its citizens are aware of when they are being recorded, an interest that is comparable to the long-recognized governmental interest in shielding listeners from unwanted speech when a "degree of captivity" makes them unable to avoid it. The Anti-Wiretap Statute's prohibition of nonconsensual surreptitious recording is narrowly tailored to serve that interest. And the Anti-Wiretap Statute preserves ample alternative channels for expression, such as nonconsensual open recording.

ARGUMENT

I. The Plaintiffs' Claims Do Not Present an Actual Case or Controversy that is Ripe for Adjudication.

This Court reviews de novo the District Court's ruling that each plaintiff's claim presents a justiciable case or controversy under Article III. In re Fin. Oversight & Mgmt. Bd. for P.R., 919 F.3d 638, 644 (1st Cir. 2019) ("In re Fin. Oversight & Mgmt Bd. II").

Article III constrains federal jurisdiction to actual "Cases" and "Controversies," a limitation that applies equally to requests for declaratory relief. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-40 (1937). In exercising their jurisdiction, federal courts are "bound by two rules": "one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the

precise facts to which it is to be applied." United States v. Raines, 362 U.S. 17, 21 (1962) (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)). "In the absence of an actual controversy, federal courts cannot issue advisory opinions." In re Fin. Oversight & Mgmt. Bd. II, 919 F.3d at 646 (quoting Golden v. Zwickler, 394 U.S. 103, 108 (1969)).

To avoid such advisory opinions, ripeness principles "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements[.]" Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 807-08 (2003) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967)); see also 13B Wright & Miller, Federal Practice & Procedure, § 3532.1 at 675-76 (3d ed. 2008) ("Ripeness rulings often are attributed to Article III. Courts speak of the need for an actual 'case or controversy,' [or] invoke the prohibition against advisory opinions . . . ."). A case is ripe if two criteria are established. First, the issue must be "fit for review," an inquiry that typically involves "finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed." Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 535 (1st Cir. 1995). Second, the court queries whether "hardship looms—an inquiry that typically turns upon whether the challenged action creates a direct and immediate dilemma for the parties." Id. Both criteria must be satisfied for a case to be ripe. Id.

Fitness for review is determined "by relating the level of present factual development to the character of the potentially controlling legal principles[.]" 13B Wright & Miller, Federal Practice & Procedure, § 3532.3 at 135 (3d ed. Supp. Apr. 2019); cf. Ayotte v. Planned Parenthood, 546 U.S. 320, 329 (2006) ("Our ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly we have already articulated the background constitutional rules at issue and how easily we can articulate the remedy. . . . [M]aking distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a 'far more serious invasion of the legislative domain' than we ought to undertake.") (quoting United States v. Treasury Employees, 513 U.S. 454, 479 n.26 (1995)). Where a claim turns on "legal issues not likely to be significantly affected by further factual development," that claim is more likely to be deemed ripe notwithstanding the absence of a developed factual record. Ernst & Young, 45 F.3d at 536. Conversely, where a claim turns on particular factual circumstances, an undeveloped record is likely to be fatal to jurisdiction, because it would require the court to "advis[e] what the law would be upon a hypothetical state of facts." Aetna Life Ins. Co., 300 U.S. at 240-41; accord Ernst & Young, 45 F.3d at 536, 538 (hypothetical cases "are seldom fit for federal judicial review" because adjudication on speculative facts is "at best difficult and often impossible").

Here, the plaintiffs' claims are not ripe for adjudication because a discrepancy exists between the facts needed to adjudicate those claims and the facts actually presented by the plaintiffs. Indeed, that discrepancy reveals the plaintiffs' claims to pose legal issues "likely to be significantly affected by further factual development." Ernst & Young, 45 F.3d at 536. As the limited number of cases recognizing a right to openly record illustrate, such a right depends on the factual circumstances surrounding a particular recording. And, although no court in the country has previously recognized a right to surreptitiously record, the existence of such a right, if indeed one exists, is even more likely to depend on the factual circumstances surrounding the recording. Yet each plaintiff below failed to present the kind of concrete facts about any prospective surreptitious recording it plans to make, that would permit a court to adjudicate their novel claims without resort to speculation, abstraction, and hypothetical facts.

A. A Right to Openly Record Depends on the Factual Circumstances.

Numerous decisions by this Court and others expounding a right to openly record demonstrate how that right depends on the factual circumstances surrounding a particular open recording. Salient circumstances may include:

- **Where the Recorded Events Take Place**. Every appellate decision to recognize a right to openly record has involved recordings made in a traditional public forum. See, e.g., Glik, 655 F.3d at 84 (Boston Common); Am. Civil Liberties Union v. Alvarez, 679 F.3d 583, 598 n.7 (7th Cir. 2012) ("traditional public fora like streets, sidewalks, plazas, parks, and other open public spaces"); Turner v. Lt. Driver, 848 F.3d 678, 683-84 (5th Cir. 2017)

(sidewalk); Fields v. City of Phila., 862 F.3d 353, 356-57 (3d Cir. 2017) (same); Gericke v. Begin, 753 F.3d 1, 3-4 (1st Cir. 2014) (roadside); State v. Russo, 141 Haw. 181, 185-86, 407 P.3d 137, 141-42 (2017) (same).

The right has not been extended to non-public fora, nor has it been extended to publicly-accessible private property. See, e.g., Estes v. Texas, 381 U.S. 532, 539-40 (1965) (no First Amendment right to televise courtroom proceedings); Rice v. Kempker, 374 F.3d 675, 678 (8th Cir. 2004) (no First Amendment right to record execution that is open to public); Mocek v. City of Albuquerque, 3 F. Supp. 3d 1002, 1071 (D.N.M. 2014) (no right to record TSA agents at airport security checkpoint, in part because airport terminal is non-public forum), aff'd on other grounds, 813 F.3d 912 (10th Cir. 2015).

- **Who Is Recorded**. Appellate decisions recognizing a right to openly record have almost uniformly involved recording a police officer, and have never involved recording a civilian who voluntarily interacts with that officer (e.g., witness, suspect, informant, etc.). See, e.g., Glik, 655 F.3d at 80; see also Gericke, 753 F.3d at 1; Alvarez, 679 F.3d at 607; Fields, 862 F.3d at 358-60; Russo, 141 Haw. at 189-94, 407 P.3d at 145-50; cf. Iacobucci v. Boulter, 193 F.3d 14, 24-25 (1st Cir. 1999) (officer not qualifiedly immune from Fourth Amendment claim for arresting plaintiff who was filming municipal commission).

- **Who Does the Recording**. This Court has made clear that the right to openly record covers only recordings that "do[] not interfere with the police officers' performance of their duties[.]" Glik, 655 F.3d at 84. Several courts have interpreted that limitation to mean that there is no such right where the recorder is an active participant in the events she records. See, e.g., Sandberg v. Englewood, 727 Fed. App'x 950, 962-63 (10th Cir. 2018) (unpublished) (affirming officers' qualified immunity from First Amendment claim where they forbade plaintiff from recording his own arrest; "[a]ll of the cases [the plaintiff] cites only involve a bystander or third party recording the police"); Basinski v. City of New York, 192 F. Supp. 3d 360, 365, 368 (S.D.N.Y. 2016) (officer qualifiedly immune from First Amendment claim where plaintiff "interjected [himself] . . . in a seemingly provocative manner" into officer's interaction with street vendor to whom he was writing a ticket).

- **What Is Recorded**. Several courts have further suggested that the limitation around not interfering with police officers may mean that there is

no right to record certain content. See, e.g., Fields, 862 F.3d at 360 ("[R]ecording a police conversation with a confidential informant may interfere with an investigation and put a life at stake."); Higginbotham v. City of N.Y., 105 F. Supp. 3d 369, 381 (S.D.N.Y. 2015) (right "may not apply . . . if the police activity is part of an undercover investigation"), aff'd sub nom. Higginbotham v. Sylvester, 741 Fed. App'x 28 (2d Cir. 2018) (unpublished).

- **The Recorder's Tactics**. This Court and others have suggested that some tactics might remove a recording from the coverage of the right to openly record. See, e.g., Belsito Comms., Inc. v. Decker, 845 F.3d 13, 27-28 (1st Cir. 2016) (no violation of clearly established First Amendment right where state trooper seized camera from photojournalist who had entered scene of fatal traffic wreck dressed as firefighter, driving surplus ambulance, and claiming to be "with" public safety agency); Rivera v. Foley, No. 14-cv-196, 2015 WL 1296258, at *10 (D. Conn. Mar. 23, 2015) (unpublished) (officers qualifiedly immune from First Amendment claim where they arrested plaintiff for using camera-equipped drone over active crime scene; "[e]ven if recording police activity were a clearly established right in the Second Circuit, Plaintiff's conduct is beyond the scope of that right as it has been articulated by other circuits").

In view of the importance of the surrounding factual circumstances, it is not surprising that, almost without exception, every appellate decision to recognize a right to openly record has come in a case featuring a concrete factual record, such as a damages action or a criminal prosecution. See Glik, 655 F.3d at 80 (§ 1983 suit); Gericke, 753 F.3d at 4 (same); Belsito Comms., 845 F.3d at 20 (same); Fields, 862 F.3d at 356 (same); Turner, 848 F.3d at 684 (same); Russo, 141 Haw. at 183, 407 P.3d at 139 (criminal action). The one decision to grant pre-enforcement relief did so based on a plan proposed by the plaintiff. Alvarez, 679 F.3d at 588.

In concluding that the present cases are justiciable, the District Court cited language in Glik that "the First Amendment protects the filming of government officials in public spaces[.]" See Add. 77-78, 89-90. But, as the preceding discussion illustrates, this language does not connote an unqualified right to openly record. To the contrary, Glik was a damages action that concerned the application of the First Amendment to a particular recording, in a particular way, of particular officers, doing a particular thing, in a particular place. 655 F.3d at 84.

B. No Court Has Previously Recognized a Right to Surreptitiously Record, But Any Such Right Would Likewise Depend on the Factual Circumstances.

Although the decision below is the first in the country to recognize a First Amendment "right to surreptitiously record," both the cases regarding open recording and common sense suggest that any such right, if it exists, would likewise depend on the factual circumstances. Indeed, given the covert nature of the recording, the factual circumstances are all the more important.

As an initial matter, the right recognized by Glik assumes that the recording is made openly. Glik himself made his recording openly. 655 F.3d at 80. And, tellingly, this Court in Gericke held that "[r]easonable restrictions on the exercise of the right to film may be imposed when the circumstances justify them" and proceeded to discuss how a police officer might permissibly order a bystander to cease recording a traffic stop. 753 F.3d at 7-8. Gericke's conception of the right to

record, and of an officer's ability to restrict it, would make no sense if the right could be exercised surreptitiously, unbeknownst to the officer or anybody else.

Furthermore, as discussed, no court other than the District Court has ever recognized any instance of a "right to surreptitiously record." To the contrary, numerous courts have expressed doubt about whether the "right to openly record" extends so far. See, e.g., Alvarez, 679 F.3d at 607 n.13 ("The distinction between open and concealed recording . . . may make a difference . . . ."); Higginbotham, 105 F. Supp. 3d at 381 (right "may not apply . . . if [recording] is surreptitious"); Felker v. R.I. College, 203 A.3d 433, 451-52 (R.I. 2019) (affirming grant of summary judgment against First Amendment retaliation claim where, although plaintiff recorded his professors, he was "not disciplined for the actual act of recording," but rather for "engaging in deceptive behavior by making surreptitious recordings").

These courts' doubts reflect that surreptitious recording differs materially from open recording: it involves a measure of deception, deprives the person being recorded of control over her own communications, and poses an enhanced risk of abuse. See pp. 42-49 below (further describing Massachusetts' interests in proscribing secret recordings). Such concerns were well known to the Legislature when it enacted the Anti-Wiretap Statute. See, e.g., Add. 24 (1968 Commission Report at 11); see pp. 3-5 above. Yet, in response to the District Attorney's

argument that surreptitious recording might sometimes pose risks distinct from open recording, the District Court dismissed that concern by stating that a police officer could always simply "order the recording to stop," Add. 78-79—apparently unmindful of the fact that an officer has no ability to interdict a surreptitious recording that she does not know is being made.

This is not to say that the First Amendment could never, in any factual circumstances, protect a surreptitious recording. But, like a right to openly record (and perhaps more so), the scope of a right to surreptitiously record, if such a right exists, must depend on the circumstances.

C. No Plaintiff Has Presented a Concrete Record About Any Prospective Surreptitious Recording It Plans to Make, that Would Permit the Court to Adjudicate Its Claim Without Resort to Speculation, Abstraction, and Hypothetical Facts.

The District Court observed that the opportunities PVA previously perceived to make surreptitious recordings in Massachusetts—including one that involved surreptitious recording of government officials—were "described with such sparse detail that they could encompass a vast array of settings and subjects" and presented "serious ripeness concerns." Add. 48, 70-71. But the District Court nevertheless concluded that it "need[ed] no additional facts to resolve" the

plaintiffs' claims.[10] Add. 69. The court erred in so concluding, because the record here is utterly devoid of the kinds of factual details that have formed the basis for this Court's and other courts' recognition of a right to openly record—let alone any right to surreptitiously record.

No plaintiff here has presented any facts at all about any prospective recording it might make in Massachusetts, except that it will be surreptitious (and, in the case of Perez, that it will be livestreamed, see A. 950). Each plaintiff emphasized that its prospective surreptitious recordings might arise with respect to an unpredictable variety of people, places, and situations. A. 263-65, 363-65, 371-72, 858-59, 944-45. And no plaintiff could articulate an intention to surreptitiously record any particular person, in any particular place, doing or saying any particular thing. A. 366-67, 860-63, 877, 955, 958.

The plaintiffs' failure to present concrete facts about the "who, what, where, when, and how" of their prospective surreptitious recordings means that any court reviewing their claim would have no choice but to indulge speculation, abstractions, and hypothetical facts, which "would be patently advisory." Babbitt

[10] The District Court's rulings on justiciability also seemed to rely on the nature and extent of the injury asserted by each plaintiff. Add. 66-67, 69-70. But the plaintiffs' claims are nonjusticiable not because of anything having to do with their asserted injuries, but rather because of the abstract quality of both the legal issues in dispute and the factual record. See 13B Wright & Miller, Federal Practice & Procedure, § 3532.1 at 383 (3d ed. 2008) (ripeness doctrine "assumes that an asserted injury is sufficient to support standing").

v. United Farm Workers Nat'l Union, 442 U.S. 289, 304 (1979); In re Fin. Oversight & Mgmt. Bd. II, 919 F.3d at 646 (affirming dismissal of claim that "seek[s] abstract declarations that are unrelated to any current concrete dispute"); In re Fin. Oversight & Mgmt. Bd. for P.R., 916 F.3d 98, 111 (1st Cir. 2019) ("In re Fin. Oversight & Mgmt. Bd. I") (affirming dismissal of claims for declaratory relief that would require court "to imagine a set of [facts]"); Kines v. Day, 754 F.2d 28, 31 (1st Cir. 1985) (claim is unripe where "[s]peculation, rather than solid evidence, would have been the only basis for any [decision]"; "[a]ny decision maker would be foolhardy to undertake such a delicate task without a fully developed record").

The nebulous quality of the plaintiffs' claims and sought-after relief also means that much future litigation would be needed to explore the boundaries of any abstract declaration of a "right to surreptitiously record." The District Court even invited such an outcome. See Add. 81-82 (deeming it "not prudential, under the ripeness doctrine," to define boundaries of the plaintiffs' claims and "leav[ing] it to subsequent cases to define these terms on a better record"). But "[a] maximum of caution is necessary . . . where a ruling is sought that would reach far beyond the particular case"; "[t]he disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding[.]" Pub. Serv. Comm'n of Utah v. Wycoff Co., 344

U.S. 237, 243-44 (1952). As this Court has recently recognized, the better course is to await the emergence of a concrete dispute. In re Fin. Oversight & Mgmt. Bd. II, 919 F.3d at 646 (affirming dismissal of claims for declaratory relief that "would reach far beyond the particular case as they unleash ramifications to be resolved in future litigation and implicate the potential claims of other[s]"). Such forbearance is all the more necessary and appropriate where the federal court is striking down a state legislature's policy choice; "a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985); see also id. at 502-03 (collecting cases where Supreme Court chose to strike down statute as applied in concrete circumstances, rather than invalidate it "on its face").

Accordingly, courts regularly forbear where a plaintiff, as here, seeks an abstract ruling that under no circumstances might its conduct be unlawful. In Texas v. United States, for example, a unanimous Supreme Court declined to rule on a request for a declaration that a provision of the Texas Education Code permitting the state to take over a local school district under some circumstances could not contravene applicable preclearance requirements of the federal Voting Rights Act, observing that the Court did not "have sufficient confidence in our powers of imagination to affirm such a negative. The operation of the statute is better grasped when viewed in light of a particular application." 523 U.S. 296, 301

(1998); see also, e.g., In re Fin. Oversight & Mgmt. Bd. I, 916 F.3d at 112 (affirming dismissal of claims for declaratory relief that do not seek to measure "legal liability on a set of already defined facts"; "[w]hatever future disputes may arise have not yet been and may never be adequately framed by their factual dimensions").

These conclusions are not diminished by the fact that the plaintiffs have asserted pre-enforcement First Amendment claims. See, e.g., Babbitt, 442 U.S. at 304 (declining to adjudicate pre-enforcement First Amendment challenge to statute allowing agricultural employer to deny labor organizers access to its employees, because organizers' "claim depends inextricably upon the attributes of the situs involved," which are "hypothetical"); Renne v. Geary, 501 U.S. 312, 321-22 (1991) (declining to adjudicate pre-enforcement First Amendment challenge to state constitutional provision forbidding political party from endorsing candidate in nonpartisan election, because record does not reveal "the nature of the endorsement, how it would be publicized, or the precise language [the government] might delete from the [government-published] voter pamphlet"); Kines, 754 F.2d at 31 (affirming dismissal of free speech challenge to regulation limiting prisoner access to mail-order publications as unripe where plaintiff presented no "proof of circumstances of actual denial of access to identified published materials"). To the contrary, the "fundamental and far-reaching import" of free speech itself supports

non-adjudication where, as here, the plaintiffs offer only an "amorphous and ill-defined factual record" as the basis for any adjudication. Renne, 501 U.S. at 324.

In sum, the context here—a putative First Amendment right to surreptitiously record Massachusetts residents, notwithstanding the Legislature's policy choice to the contrary—is one that is highly fact-dependent, and yet the plaintiffs offered the District Court no facts to adjudicate. This Court should therefore vacate the ill-defined judgment below and remand with instructions to dismiss the complaints for want of Article III jurisdiction.

II. Assuming Article III Permits Adjudication of the Plaintiffs' Claims, the District Attorney Is Entitled to an Award of Summary Judgment.

To the extent that the plaintiffs' claims present a justiciable controversy, the District Attorney is entitled to an award of summary judgment. This Court reviews de novo the District Court's ruling to the contrary, drawing inferences in favor of the non-moving party separately as to each motion for summary judgment. See, e.g., Am. Home Assur. Co. v. AGM Marine Contractors, Inc., 467 F.3d 810, 812 (1st Cir. 2006).

Here, after correctly categorizing the plaintiffs' claims as "facial" in nature, the District Court neglected to apply the standards for a facial challenge—standards the plaintiffs cannot satisfy. And, even analyzing the plaintiffs' claims, as the District Court erroneously did, as "as-applied" challenges subject to intermediate scrutiny, the Anti-Wiretap Statute withstands such scrutiny.

A. The Plaintiffs Cannot Show that the Anti-Wiretap Statute Lacks a "Plainly Legitimate Sweep," As Is Required to Satisfy the Standards for a Facial Constitutional Challenge.

In response to the parties' disagreement over whether the plaintiffs' challenges to the Anti-Wiretap Statute were "as applied" or "facial" in nature, the District Court concluded that they were facial. Add. 71-73. That conclusion was correct. The choice between an "as applied" or "facial" analytical framework depends on whether the claim, and the relief that would follow, "reach[es] beyond the particular circumstances of the[] plaintiff[]." Showtime Entm't, LLC v. Town of Mendon, 769 F.3d 61, 70 (1st Cir. 2014) (quoting John Doe No. 1. v. Reed, 561 U.S. 186, 194 (2010)). Here, each plaintiff sought declaratory and injunctive relief tied not to his particular circumstances, but rather to broad, abstract categories such as all "government officials" and all "public places." See A. 128-29, 754.

This conclusion carries important consequences for the burden of proof. Specifically, where—as here—a plaintiff seeks relief that does not implicate the full scope of the challenged statute, but nonetheless reaches beyond his own circumstances, that plaintiff must "satisfy [the] standards for a facial challenge to the extent of that reach." Showtime Entm't, 769 F.3d at 70 (quoting Reed, 561 U.S. at 194); see, e.g., Reed, 561 U.S. at 194 (signatories to one referendum petition, who seek to forbid application of state public records law to signature sheets for any referendum, must satisfy standards for facial claim). The standards

for a facial challenge, in turn, require the plaintiff to show that the challenged statute "do[es] not have a plainly legitimate sweep" within the scope of his claim. Showtime Entm't, 769 F.3d at 70; cf. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 455-58 (2008) (conclusion that some challenged applications of statute would be consistent with First Amendment is "fatal" to facial challenge). And, in the First Amendment context, a statute's "plainly legitimate sweep" is assessed by measuring "all possible applications of the law" within the scope of the plaintiff's claim against the applicable level of First Amendment scrutiny. Showtime Entm't, 769 F.3d at 71 (citing Reed, 561 U.S. at 194); see also United States v. Stevens, 559 U.S. 460, 472-73 (2010). These are demanding standards that reflect the "disfavor[]" accorded to facial challenges. See, e.g., Wash. State Grange, 552 U.S. at 450-51 (facial challenges often: contravene principle that federal courts should avoid unnecessary constitutional adjudication; risk disrupting democratic process; and require speculation about how challenged statute might apply).

But, here, the District Court erroneously failed to hold the plaintiffs to these standards. The phrase "legitimate sweep" appears nowhere in the District Court's opinions. To the contrary, the District Court held the District Attorney to the burden of showing that all applications of the Anti-Wiretap Statute within the scope of the plaintiffs' claims are constitutional. See Add. 79 (concluding that

Anti-Wiretap Statute must be struck down because it "applies regardless of whether the official being recorded has a significant privacy interest and regardless of whether there is any First Amendment interest in gathering the information in question").

Proper application of these standards must account for the ambitious scope of the plaintiffs' claims, particularly the aspect of their claims that sought a right to surreptitiously record in all "public spaces." Although no plaintiff committed to a plan to surreptitiously record in a particular place, the plaintiffs defined "public spaces" broadly for purposes of their claim: Martin viewed them to include "streets, sidewalks, parks and MBTA stations," as well as "other publically [sic] accessible indoor or outdoor locations that are open to the general public without locked doors or key cards or permission," A. 882, while PVA similarly viewed them to include all "location[s] that [are] generally open and accessible to people," A. 517.[11] These definitions embraced traditional and designated public fora, non-public fora, and publicly-accessible private property alike—each of which implicates a different level of First Amendment scrutiny. See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (content-neutral regulation of speech in

[11] Relatedly, PVA viewed "public officials" to include: (1) anyone "who holds or is invested with a public office; a person elected or appointed to carry out some portion of a government's sovereign powers"; and (2) anyone "employed in a department responsible for conducting the affairs of a national or local government." A. 517-18.

traditional or designated public forum is analyzed using intermediate scrutiny); New Eng. Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 20 (1st Cir. 2002) ("In a non-public forum, the constitutional hurdle is considerably lower [than intermediate scrutiny]: to clear it, a viewpoint-neutral restriction need only be reasonable."); Cape Cod Nursing Home Council v. Rambling Rose Rest Home, 667 F.2d 238, 239-42 (1st Cir. 1981) (no right to free expression on another's private property); see generally Minn. Voters Alliance v. Mansky, --- U.S. ---, 138 S. Ct. 1876, 1885-86 (2018) (discussing different levels of scrutiny applicable in different fora).

Although the District Court declined to define "public space" in awarding declaratory relief, stating that it would be "not prudential" to do so, Add. 81-82, 92, it nonetheless chose to apply intermediate scrutiny indiscriminately to the entire scope of the plaintiffs' claims. Add. 73-74. This choice was erroneous; instead, proper application of the standards for a facial challenge requires:

- Analysis of "all possible applications" of the Anti-Wiretap Statute in traditional and designated public fora (within the scope of the plaintiffs' claims) under intermediate scrutiny. This analysis reveals a "plainly legitimate sweep" of such applications that satisfies intermediate scrutiny. See pp. 41-54 below.

- Analysis of "all possible applications" of the Anti-Wiretap Statute in non-public fora (within the scope of the plaintiffs' claims) for reasonableness. This analysis reveals that a "plainly legitimate sweep" of such applications is indeed reasonable, in view of the important governmental interests at stake. See pp. 42-49 below.

- The conclusion that "all possible applications" of the Anti-Wiretap Statute on publicly-accessible private property (within the scope of the plaintiffs' claims) are not subject to First Amendment scrutiny at all. As such, all such applications form a "plainly legitimate sweep."

Thus, each of these analyses compels the conclusion that the plaintiffs cannot show that the Anti-Wiretap Statute lacks a plainly legitimate sweep. Accordingly, the District Attorney is entitled to an award of summary judgment.

B. The Anti-Wiretap Statute Withstands Intermediate Scrutiny.

Intermediate scrutiny requires a reviewing court to analyze whether a challenged speech regulation: (1) serves a significant governmental interest; (2) is narrowly tailored to do so; and (3) preserves ample alternative channels for expression. Ward, 491 U.S. at 791.[12]

[12] Although the District Attorney assumed in the District Court that forum-based analysis was appropriate, she also observed in the District Court (see ECF #128 at 21 in PVA v. Rollins, No. 16-cv-10462; ECF #114 at 20 in Martin v. Gross, No. 16-cv-11362), and again observes here, that the Anti-Wiretap Statute might alternatively be analyzed as a regulation of conduct that imposes a mere incidental burden on expression. Under that analysis, a regulation is justified "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 376-77 (1968). Application of that standard, just like application of intermediate scrutiny, compels an award of summary judgment for the District Attorney: The Anti-Wiretap Statute's regulation of conduct (i.e., recording) is within the Commonwealth's police powers, furthers an important governmental interest unrelated to free expression (see pp. 42-49 below), and burdens expression no more than necessary to further that interest (see pp. 49-52 below).

Even assuming that the District Court was correct to apply intermediate scrutiny indiscriminately to entire scope of the plaintiffs' claims, the Anti-Wiretap Statute withstands it. The Commonwealth has a significant interest in ensuring that its citizens are aware of when they are being recorded; the Anti-Wiretap Statute's prohibition of nonconsensual surreptitious audio recording is narrowly tailored to serve that interest; and the statute preserves ample alternative channels for expression.

1. The Commonwealth has a significant interest in ensuring that its citizens are aware of when they are being recorded.

As noted, the District Attorney values public scrutiny of government affairs, including that accomplished through recordings. But the Anti-Wiretap Statute does not prohibit all recordings; only those recordings made in a surreptitious manner without the awareness of the person(s) recorded. The Commonwealth's significant interest in the Anti-Wiretap Statute thus is to assure that its citizens are aware of when they are being recorded, safeguarding a specific type of privacy—not freedom from being recorded, but rather notice of being recorded.

The First Amendment has long allowed for such safeguards of an unwilling participant in an otherwise-protected expression. An unwilling participant in a protected expression—one who, against her wishes, sees another's message or hears another's speech—typically is expected to take affirmative steps to avoid the unwanted expression. E.g., Cohen v. California, 403 U.S. 15, 21 (1971). But,

where a "degree of captivity makes it impractical for the unwilling viewer or auditor to avoid" the unwanted expression, the government may restrict that expression, including by use of a valid time, place, or manner regulation. Hill v. Colorado, 530 U.S. 703, 717 n.24 (2000) (upholding ban on approaching person outside of health care facility without that person's consent); Frisby v. Schultz, 487 U.S. 474, 487 (1988) (upholding ban on picketing directed at specific residence); Kovacs v. Cooper, 336 U.S. 77, 83-87 (1949) (upholding ban on sound trucks on public streets). In such situations, the captive participant's ability to avoid the unwanted expression is "accurately characterized as an 'interest' that States can choose to protect[.]" Hill, 530 U.S. at 717 n.24 (emphasis added).

The same principles apply here to establish the significance of the Commonwealth's interest in assuring that its citizens are aware of when they are being recorded. The plaintiffs claim a First Amendment right to record. But, when a recording is made surreptitiously, the person being recorded unwittingly becomes a captive. Like other captive participants, that person might prefer to seek a more private place, to measure what she says, to not speak at all, or to create her own recording of the interaction. See Add. 24 (1968 Commission Report at 11 (Cole & Homans, concurring) ("At the very least the individual should himself be able to determine who should have authority to mechanically reproduce his words.")).

But, because the recording is surreptitious, that person is unaware of the recording, and thus is deprived of any meaningful opportunity to do anything about it.

The record illustrates the significance of the Commonwealth's interest. It reveals that PVA consistently uses deceit to ingratiate itself with the people it seeks to record, including by falsely presenting its identity, its sympathies, and its motives for interacting with the target. See, e.g., A. 254-55, 258, 261-62, 409, 412-13, 471-72. It reveals that Martin has recorded civilians who interact with a government official, or bystanders who happen to wander into audible recording range, without apparent regard for the nature of the interaction, who those people are, or whether they wish to be recorded. See A. 792-93, 807-15, 832-34, 867-69, 882-85, 896-97; A. 993-98 & Add. 62-64; A. 894 ("MARTIN0000028.mov"; "MARTIN0000032.mov" at 00:29 - 00:34; "MARTIN0000034.mov" at 00:34 - 00:47). And it reveals that, when he is recording, Perez is not averse either to inserting himself into an officer's interaction with a third party or to falsely denying that he is making a recording, A. 941-43, 948-49, 959-60, a combination that could understandably affect the participants' choices about what to say and how to say it. The record does not reveal apparent regard for how a surreptitious recording that is livestreamed (as Perez testified he would do with his prospective surreptitious recordings, see A. 950), or one that is edited out of context (as PVA has done, see A. 374-75, 378-79; compare A. 534 ("confidential - FNOE0239_

20150628192900.mp4") with A. 534 ("17K Teachers Union President[].mp4"), might aggravate the effect of that recording. And it reveals that PVA and Martin have made recordings at locations, such as a restaurant or Yankee Stadium, that are publicly accessible but are not traditional public fora where a person might be more likely to anticipate being recorded. A. 323; A. 993-98 & Add. 62-64; A. 894 ("MARTIN0000027.mov" & "MARTIN0000028.mov").

The District Court rejected this argument on the ground that the "captive participant" line of cases has never been applied to the right to record. Add. 75. But this was a non sequitur: Every previous "right to record" case has involved an open recording (see pp. 29-31 above), a scenario that does not implicate "captive participants" because a person who is openly recorded retains the ability simply to walk away.

The District Court instead characterized the Commonwealth's interest in the Anti-Wiretap Statute as the general "privacy interests" of government officials while in public places. Add. 75-77. But this distorted the Commonwealth's interest in at least two ways.

First, it transformed the Commonwealth's interest in safeguarding a concrete and specific type of privacy—that is, assuring that people are aware of when they are being recorded—into a vague and nebulous notion of undifferentiated "privacy interests." Compounding this, the District Court even

acknowledged that government officials in public places indeed have "privacy interests," albeit "diminished" ones. Add. 77. But, for purposes of these appeals, any variability in the force of the Commonwealth's interest in safeguarding particular individuals' privacy simply affirms that the plaintiffs' claims are not fit for the broad-brush adjudication they seek.

Second, by limiting its characterization to the interests of government officials, the District Court failed to consider the Commonwealth's significant interest in protecting affected civilians. Cf. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-47 (1974) (heightened standard that government official must meet to establish liability for libel under N.Y. Times v. Sullivan does not apply to private citizens). Civilians have many reasons to voluntarily interact with a public official in a public place. For example:

- A police officer may meet with a confidential informant on a park bench, or may encounter on the street a victim or witness to a fresh crime; Alvarez, 679 F.3d at 614 (Posner, J., dissenting);
- An elected official may hold "office hours" at a municipal senior center to meet one-on-one with citizens in need of help;
- A school administrator may meet a parent at a coffeehouse to discuss a student's performance;
- A citizen may go to the counter at the RMV seeking to renew her license;
- A group of students may be taken by a public schoolteacher to a museum, playground, or other public place; or
- A social worker may counsel a sexual assault victim in the lobby or corridor of a publicly owned hospital.

Moreover, a civilian who is not interacting with a government official might simply be within audible recording range of a government official who is being surreptitiously recorded. In all of these scenarios, surreptitious recording of the civilian is within the scope of the plaintiffs' claims. See A. 128-29, 754. Thus, even leaving aside the extent of government officials' privacy interests, Massachusetts' significant interest in preventing nonconsensual recordings of affected private persons alone suffices to support a "plainly legitimate sweep" that defeats the plaintiffs' facial challenge to the Anti-Wiretap Statute.

The District Court suggested that interactions not intended for publication should occur in private. Add. 78-79. But the Legislature rejected such a policy, which would diminish the vibrancy of our public spaces and the quality of the discourse that occurs there. See Add. 25 (1968 Commission Report at 12 (Cole & Homans, concurring) (anything less than two-party consent "creates a serious inhibition on freedom of communication, especially because the person who chooses to speak frankly and freely in personal conversation runs the risk, under such a situation, that what he says in jest, with a wink, for its shock value on his conversational partner, or to test some belief held by the other party, can now be produced in evidence against him, with all the impact . . . that we know such a tape recording exerts") (quoting letter from A. Westin)); accord United States v. White, 401 U.S. 745, 787 n.23 (1971) (Harlan, J., dissenting) ("[P]ermitting

eavesdropping with the consent of one party would be to sanction a means of reproducing conversation that could choke off much vital social exchange.") (quoting A. Westin, Privacy and Freedom 131 (1967)). It would also risk chilling important speech of both governmental officials and the civilians with whom they interact by discouraging such interactions and causing all parties to shade their words when they occur. E.g., Bartnicki v. Vopper, 532 U.S. 514, 517, 533 (2001) ("Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.") (quoting President's Comm'n on Law Enforcement & Admin. of Justice, The Challenge of Crime in a Free Society 202 (1967)).

The Legislature also rejected the notion that anyone who speaks with a government official in a public place must accept the risk of publication. "[P]rivate talk in public places is common, indeed ubiquitous," in part because people "rely on their anonymity and on the limited memory of others to minimize the risk of publication . . . ." Alvarez, 679 F.3d at 613-14 (Posner, J., dissenting); White, 401 U.S. at 787-88 (Harlan, J., dissenting) ("Much off-hand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a

conversation without having to contend with a documented record."). Although "every person[] runs the risk that his confidence in the person to whom he is talking may be betrayed," the Legislature enacted the Anti-Wiretap Statute in furtherance of the Commonwealth's significant interest in "protect[ing] the individual from being betrayed" rather than "legitimatiz[ing] the betrayal." Add. 24 (1968 Commission Report at 11 (Cole & Homans, concurring)).

2. The Anti-Wiretap Statute's prohibition of nonconsensual surreptitious audio recording is narrowly tailored to serve the Commonwealth's interest.

A regulation of the manner of expression is appropriately tailored if the governmental interest it promotes "would be achieved less effectively absent the regulation." Nat'l Amusements v. Town of Dedham, 43 F.3d 731, 744 (1st Cir. 1995) (quoting Ward, 491 U.S. at 799). The regulation "need not be the least restrictive or least intrusive means of serving the government's interests." McCullen v. Coakley, 573 U.S. 464, 486 (2014) (quoting Ward, 491 U.S. at 799).

Here, the Anti-Wiretap Statute is suitably tailored to serve the Commonwealth's interest in assuring that its citizens are aware of when they are being recorded. Specifically, the only way to assure such awareness is to require that recording be done openly. Through its ban of nonconsensual surreptitious recording, the Anti-Wiretap Statute burdens the act of recording no more and no less. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 808

(1984) (regulation is narrowly tailored where it "[does] no more than eliminate the exact source of the evil it sought to remedy").

That the Anti-Wiretap Statute completely bans nonconsensual surreptitious audio recording does not render it insufficiently tailored. To the contrary, where the harm that the government seeks to ameliorate is inherent in a mode of expression, the government may validly ban that mode of expression. E.g., id. at 808-10 (upholding complete ban on signage on public property; visual clutter on public property "is not merely a possible byproduct of the [expressive] activity, but is created by the medium of expression itself"); Frisby, 487 U.S. at 487 (upholding complete ban on targeted residential picketing); Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175, 191-92 (1st Cir. 1996) (upholding complete ban on newsracks as mode of distributing newspapers). Furthermore, the Anti-Wiretap Statute's mode of regulation—at its essence, a form of notice and consent with respect to a type of information gathering—is one that continues to have purchase in contemporary policymaking around privacy in the digital space. See, e.g., Cal. Consumer Privacy Act, Cal. Civ. Code § 1798.100 et seq. (certain businesses that collect personal information must notify consumers of categories of personal information that are collected and must not sell consumer's personal information to third party if consumer so requests) (eff. Jan. 1, 2020); European Union General Data Protection Regulation, No. 2016/679, Arts. 14, 18 (certain

controllers of personal data must notify data's subject of categories of data obtained; subject may then require controller to limit its use of that data under some circumstances) (eff. May 25, 2018).

The District Court did not explain, or even attempt to explain, how the Anti-Wiretap Statute was somehow ineffective in serving the Commonwealth's interest. Instead, it simply asserted that "the diminished privacy interests of government officials performing their duties in public must be balanced by the First Amendment interest in newsgathering and information-dissemination." Add. 77. But a "time, place, or manner" regulation entitled to intermediate scrutiny is, by definition, enacted against the background of an important First Amendment right. The tailoring of such a regulation is assessed not by ad hoc invocation of "First Amendment interests," but rather by analyzing whether the regulation "focuses on the source of the evils [it] seeks to eliminate . . . and eliminates them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." Ward, 491 U.S. at 800 n.7 ("This is the essence of narrow tailoring."); see, e.g., Turner Broadcasting Sys., Inc. v. F.C.C., 520 U.S. 180, 215-16, 224 (1997) (statute is narrowly tailored where "[n]one of its provisions appears unrelated to the ends that it was designed to serve"; policy judgments underlying statute "cannot be ignored or undervalued simply because [appellants] cas[t] [their] claims under the umbrella of the First Amendment")

(quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 297 (1984) and Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973) (alterations in original)).

3. The Anti-Wiretap Statute's prohibition of nonconsensual surreptitious audio recording preserves ample alternative channels for expression.

In determining the existence of ample alternative channels of expression, the focus is "not on whether a degree of curtailment exists, but on whether the remaining communicative avenues are adequate." Sullivan v. City of Augusta, 511 F.3d 16, 49 (1st Cir. 2007). Adequacy does not require equivalence: A speaker is not entitled to her preferred manner of communication, and the remaining channels need not be perfect substitutes. Id.; Globe Newspaper Co., 100 F.3d at 194; see also McCullen, 573 U.S. at 488 ("[T]he First Amendment does not guarantee a speaker the right to any particular form of expression . . . ."). Rather, a speaker "must simply be afforded the opportunity to reach the intended audience in an adequate manner." Johnson v. City & County of Phila., 665 F.3d 486, 494 (3d Cir. 2011) (internal citations omitted); see also Ward, 491 U.S. at 802 (alternative channel may be adequate even if it "may reduce to some degree the potential audience" for the expression).

Here, the Anti-Wiretap Statute preserves adequate alternative channels. It does not limit open recording in any way. See Mass. G.L. c. 272, § 99(B)(4)

("interception" requires "secret[]" hearing or recording). Nor does it limit an in-person recording, open or surreptitious, that captures only visual content.[13] See id. § 99(B)(1), (2), & (4) ("interception" requires hearing or recording "wire" or "oral communication"). It does not limit any activities accomplished by non-electronic means. See id. § 99(B)(3) & (4) ("interception" requires use of "intercepting device"). And it does not limit one's ability to disseminate the content of any communication that is lawfully overheard. Cf., e.g., Rice, 374 F.3d at 680-81 (policy barring attendees from recording execution preserves alternative channels for communication, because attendees may "disseminat[e] to the public any information gathered from attending"). These alternatives permit the plaintiffs to reach their intended audience, and thus are constitutionally adequate. E.g., Globe Newspaper Co., 100 F.3d at 193-94 (alternative channels are adequate where ban on newsracks did not burden publishers' ability to distribute newspapers in same place using street vendors).

The District Court did not reach the "alternative channels" prong of intermediate scrutiny but stated that, if it did, "the self-authenticating character of audio recording makes it highly unlikely that other methods could be considered

[13] Because the Anti-Wiretap Statute applies to "wire communications," it prohibits surreptitious interception of non-aural content that is communicated over a wire. See, e.g., Commonwealth v. Moody, 466 Mass. 196, 207-08, 993 N.E.2d 715, 723 (2013) (Anti-Wiretap Statute bans interception of text messages).

reasonably adequate substitutes." Add. 79-80. But, contrary to the District Court's implication, the Anti-Wiretap Statute does not bar "audio recording" as a category: It regulates only surreptitious audio recording. Although the plaintiffs argued before the District Court that surreptitious recording has no adequate substitutes, the First Amendment does not guarantee a speaker's preferred manner of expression. See, e.g., Contributor v. City of Brentwood, 726 F.3d 861, 866 (6th Cir. 2013) ("[A]n alternative is not inadequate simply because the speaker must change its tactics. If this were so, then a speaker could limit the adequacy of alternatives by choosing its method of communication and limiting its tactics to a specific form of communication. Such a rule would largely deprive the government of the ability to enact reasonable time, place, and manner restrictions."); Marcavage v. City of N.Y., 689 F.3d 98, 107 (2d Cir. 2012) ("[W]ere we to interpret the requirement [to guarantee a 'perfect substitute[]' for the regulated manner of communication], no alternative channels could ever be deemed 'ample.'"). Here, the Anti-Wiretap Statute leaves the plaintiffs free to record anyone openly without consent, whether up close or at a remove; to make surreptitious in-person visual recordings; to listen with their own ears; and to report on what they see, hear, and lawfully record. These channels are adequate.

CONCLUSION

This Court should vacate the District Court's judgments and should either order each case dismissed for lack of jurisdiction or order the entry of judgment in favor of the defendants in each case.

Respectfully submitted,

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August 21, 2019

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CERTIFICATES

Certificate of Compliance

1. This brief complies with the type-volume limitation established by order of this Court dated July 31, 2019, because it contains 14,375 words, exclusive of those parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

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August 21, 2019

Certificate of Service

I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers using the corresponding e-mail addresses, and that they will be served electronically by the CM/ECF system:

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ADDENDUM

Statutes and Legal Materials

Filings and Proceedings in PVA v. Rollins, No. 16-cv-10462 (D. Mass.)

Filings and Proceedings in Martin v. Gross, No. 16-cv-11362 (D. Mass.)

[†] This document also appears in the record as ECF #144-7 in Martin v. Gross, No. 16-cv-11362 (D. Mass.).

[*] Cross-filed in Martin v. Gross, No. 16-cv-11362 (D. Mass.).

Massachusetts General Laws Annotated
Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)
Title I. Crimes and Punishments (Ch. 263-274)
Chapter 272. Crimes Against Chastity, Morality, Decency and Good Order (Refs & Annos)

M.G.L.A. 272 § 99

§ 99. Interception of wire and oral communications

Currentness

Interception of wire and oral communications.--

A. Preamble.

The general court finds that organized crime exists within the commonwealth and that the increasing activities of organized crime constitute a grave danger to the public welfare and safety. Organized crime, as it exists in the commonwealth today, consists of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services. In supplying these goods and services organized crime commits unlawful acts and employs brutal and violent tactics. Organized crime is infiltrating legitimate business activities and depriving honest businessmen of the right to make a living.

The general court further finds that because organized crime carries on its activities through layers of insulation and behind a wall of secrecy, government has been unsuccessful in curtailing and eliminating it. Normal investigative procedures are not effective in the investigation of illegal acts committed by organized crime. Therefore, law enforcement officials must be permitted to use modern methods of electronic surveillance, under strict judicial supervision, when investigating these organized criminal activities.

The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited. The use of such devices by law enforcement officials must be conducted under strict judicial supervision and should be limited to the investigation of organized crime.

B. Definitions. As used in this section--

1. The term “wire communication” means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception.

2. The term “oral communication” means speech, except such speech as is transmitted over the public air waves by radio or other similar device.

3. The term “intercepting device” means any device or apparatus which is capable of transmitting, receiving, amplifying, or recording a wire or oral communication other than a hearing aid or similar device which is being used to correct subnormal hearing to normal and other than any telephone or telegraph instrument, equipment, facility, or a component thereof, (a) furnished

to a subscriber or user by a communications common carrier in the ordinary course of its business under its tariff and being used by the subscriber or user in the ordinary course of its business; or (b) being used by a communications common carrier in the ordinary course of its business.

4. The term "interception" means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; provided that it shall not constitute an interception for an investigative or law enforcement officer, as defined in this section, to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.

5. The term "contents", when used with respect to any wire or oral communication, means any information concerning the identity of the parties to such communication or the existence, contents, substance, purport, or meaning of that communication.

6. The term "aggrieved person" means any individual who was a party to an intercepted wire or oral communication or who was named in the warrant authorizing the interception, or who would otherwise have standing to complain that his personal or property interest or privacy was invaded in the course of an interception.

7. The term "designated offense" shall include the following offenses in connection with organized crime as defined in the preamble: arson, assault and battery with a dangerous weapon, extortion, bribery, burglary, embezzlement, forgery, gaming in violation of section seventeen of chapter two hundred and seventy-one of the general laws, intimidation of a witness or juror, kidnapping, larceny, lending of money or things of value in violation of the general laws, mayhem, murder, any offense involving the possession or sale of a narcotic or harmful drug, perjury, prostitution, robbery, subornation of perjury, any violation of this section, being an accessory to any of the foregoing offenses and conspiracy or attempt or solicitation to commit any of the foregoing offenses.

8. The term "investigative or law enforcement officer" means any officer of the United States, a state or a political subdivision of a state, who is empowered by law to conduct investigations of, or to make arrests for, the designated offenses, and any attorney authorized by law to participate in the prosecution of such offenses.

9. The term "judge of competent jurisdiction" means any justice of the superior court of the commonwealth.

10. The term "chief justice" means the chief justice of the superior court of the commonwealth.

11. The term "issuing judge" means any justice of the superior court who shall issue a warrant as provided herein or in the event of his disability or unavailability any other judge of competent jurisdiction designated by the chief justice.

12. The term "communication common carrier" means any person engaged as a common carrier in providing or operating wire communication facilities.

13. The term "person" means any individual, partnership, association, joint stock company, trust, or corporation, whether or not any of the foregoing is an officer, agent or employee of the United States, a state, or a political subdivision of a state.

14. The terms "sworn" or "under oath" as they appear in this section shall mean an oath or affirmation or a statement subscribed to under the pains and penalties of perjury.

15. The terms "applicant attorney general" or "applicant district attorney" shall mean the attorney general of the commonwealth or a district attorney of the commonwealth who has made application for a warrant pursuant to this section.

16. The term "exigent circumstances" shall mean the showing of special facts to the issuing judge as to the nature of the investigation for which a warrant is sought pursuant to this section which require secrecy in order to obtain the information desired from the interception sought to be authorized.

17. The term "financial institution" shall mean a bank, as defined in section 1 of chapter 167, and an investment bank, securities broker, securities dealer, investment adviser, mutual fund, investment company or securities custodian as defined in section 1.165-12(c)(1) of the United States Treasury regulations.

18. The term "corporate and institutional trading partners" shall mean financial institutions and general business entities and corporations which engage in the business of cash and asset management, asset management directed to custody operations, securities trading, and wholesale capital markets including foreign exchange, securities lending, and the purchase, sale or exchange of securities, options, futures, swaps, derivatives, repurchase agreements and other similar financial instruments with such financial institution.

C. Offenses.

1. Interception, oral communications prohibited.

Except as otherwise specifically provided in this section any person who--

willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one half years, or both so fined and given one such imprisonment.

Proof of the installation of any intercepting device by any person under circumstances evincing an intent to commit an interception, which is not authorized or permitted by this section, shall be prima facie evidence of a violation of this subparagraph.

2. Editing of tape recordings in judicial proceeding prohibited.

Except as otherwise specifically provided in this section any person who willfully edits, alters or tampers with any tape, transcription or recording of oral or wire communications by any means, or attempts to edit, alter or tamper with any tape, transcription or recording of oral or wire communications by any means with the intent to present in any judicial proceeding or proceeding under oath, or who presents such recording or permits such recording to be presented in any judicial proceeding or proceeding under oath, without fully indicating the nature of the changes made in the original state of the recording, shall be

fined not more than ten thousand dollars or imprisoned in the state prison for not more than five years or imprisoned in a jail or house of correction for not more than two years or both so fined and given one such imprisonment.

3. Disclosure or use of wire or oral communications prohibited.

Except as otherwise specifically provided in this section any person who--

a. willfully discloses or attempts to disclose to any person the contents of any wire or oral communication, knowing that the information was obtained through interception; or

b. willfully uses or attempts to use the contents of any wire or oral communication, knowing that the information was obtained through interception, shall be guilty of a misdemeanor punishable by imprisonment in a jail or a house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

4. Disclosure of contents of applications, warrants, renewals, and returns prohibited.

Except as otherwise specifically provided in this section any person who--

willfully discloses to any person, any information concerning or contained in, the application for, the granting or denial of orders for interception, renewals, notice or return on an ex parte order granted pursuant to this section, or the contents of any document, tape, or recording kept in accordance with paragraph N, shall be guilty of a misdemeanor punishable by imprisonment in a jail or a house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

5. Possession of interception devices prohibited.

A person who possesses any intercepting device under circumstances evincing an intent to commit an interception not permitted or authorized by this section, or a person who permits an intercepting device to be used or employed for an interception not permitted or authorized by this section, or a person who possesses an intercepting device knowing that the same is intended to be used to commit an interception not permitted or authorized by this section, shall be guilty of a misdemeanor punishable by imprisonment in a jail or house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

The installation of any such intercepting device by such person or with his permission or at his direction shall be prima facie evidence of possession as required by this subparagraph.

6. Any person who permits or on behalf of any other person commits or attempts to commit, or any person who participates in a conspiracy to commit or to attempt to commit, or any accessory to a person who commits a violation of subparagraphs 1 through 5 of paragraph C of this section shall be punished in the same manner as is provided for the respective offenses as described in subparagraphs 1 through 5 of paragraph C.

D. Exemptions.

1. Permitted interception of wire or oral communications.

It shall not be a violation of this section--

a. for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of service or to the protection of the rights or property of the carrier of such communication, or which is necessary to prevent the use of such facilities in violation of section fourteen A of chapter two hundred and sixty-nine of the general laws; provided, that said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

b. for persons to possess an office intercommunication system which is used in the ordinary course of their business or to use such office intercommunication system in the ordinary course of their business.

c. for investigative and law enforcement officers of the United States of America to violate the provisions of this section if acting pursuant to authority of the laws of the United States and within the scope of their authority.

d. for any person duly authorized to make specified interceptions by a warrant issued pursuant to this section.

e. for investigative or law enforcement officers to violate the provisions of this section for the purposes of ensuring the safety of any law enforcement officer or agent thereof who is acting in an undercover capacity, or as a witness for the commonwealth; provided, however, that any such interception which is not otherwise permitted by this section shall be deemed unlawful for purposes of paragraph P.

f. for a financial institution to record telephone communications with its corporate or institutional trading partners in the ordinary course of its business; provided, however, that such financial institution shall establish and maintain a procedure to provide semi-annual written notice to its corporate and institutional trading partners that telephone communications over designated lines will be recorded.

2. Permitted disclosure and use of intercepted wire or oral communications.

a. Any investigative or law enforcement officer, who, by any means authorized by this section, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents or evidence in the proper performance of his official duties.

b. Any investigative or law enforcement officer, who, by any means authorized by this section has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may use such contents or evidence in the proper performance of his official duties.

c. Any person who has obtained, by any means authorized by this section, knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any state or in any federal or state grand jury proceeding.

d. The contents of any wire or oral communication intercepted pursuant to a warrant in accordance with the provisions of this section, or evidence derived therefrom, may otherwise be disclosed only upon a showing of good cause before a judge of competent jurisdiction.

e. No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this section shall lose its privileged character.

E. Warrants: when issuable:

A warrant may issue only:

1. Upon a sworn application in conformity with this section; and

2. Upon a showing by the applicant that there is probable cause to believe that a designated offense has been, is being, or is about to be committed and that evidence of the commission of such an offense may thus be obtained or that information which will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit a designated offense may thus be obtained; and

3. Upon a showing by the applicant that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried.

F. Warrants: application.

1. Application. The attorney general, any assistant attorney general specially designated by the attorney general, any district attorney, or any assistant district attorney specially designated by the district attorney may apply ex parte to a judge of competent jurisdiction for a warrant to intercept wire or oral communications. Each application ex parte for a warrant must be in writing, subscribed and sworn to by the applicant authorized by this subparagraph.

2. The application must contain the following:

a. A statement of facts establishing probable cause to believe that a particularly described designated offense has been, is being, or is about to be committed; and

b. A statement of facts establishing probable cause to believe that oral or wire communications of a particularly described person will constitute evidence of such designated offense or will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit a designated offense; and

c. That the oral or wire communications of the particularly described person or persons will occur in a particularly described place and premises or over particularly described telephone or telegraph lines; and

d. A particular description of the nature of the oral or wire communications sought to be overheard; and

e. A statement that the oral or wire communications sought are material to a particularly described investigation or prosecution and that such conversations are not legally privileged; and

f. A statement of the period of time for which the interception is required to be maintained. If practicable, the application should designate hours of the day or night during which the oral or wire communications may be reasonably expected to occur. If the nature of the investigation is such that the authorization for the interception should not automatically terminate when the described oral or wire communications have been first obtained, the application must specifically state facts establishing probable cause to believe that additional oral or wire communications of the same nature will occur thereafter; and

g. If it is reasonably necessary to make a secret entry upon a private place and premises in order to install an intercepting device to effectuate the interception, a statement to such effect; and

h. If a prior application has been submitted or a warrant previously obtained for interception of oral or wire communications, a statement fully disclosing the date, court, applicant, execution, results, and present status thereof; and

i. If there is good cause for requiring the postponement of service pursuant to paragraph L, subparagraph 2, a description of such circumstances, including reasons for the applicant's belief that secrecy is essential to obtaining the evidence or information sought.

3. Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the facts alleged, it must be so stated. If the facts establishing such probable cause are derived in whole or part from the statements of persons other than the applicant, the sources of such information and belief must be either disclosed or described; and the application must contain facts establishing the existence and reliability of any informant and the reliability of the information supplied by him. The application must also state, so far as possible, the basis of the informant's knowledge or belief. If the applicant's information and belief is derived from tangible evidence or recorded oral evidence, a copy or detailed description thereof should be annexed to or included in the application. Affidavits of persons other than the applicant may be submitted in conjunction with the application if they tend to support any fact or conclusion alleged therein. Such accompanying affidavits may be based either on personal knowledge of the affiant or information and belief, with the source thereof, and reason therefor, specified.

G. Warrants: application to whom made.

Application for a warrant authorized by this section must be made to a judge of competent jurisdiction in the county where the interception is to occur, or the county where the office of the applicant is located, or in the event that there is no judge of competent jurisdiction sitting in said county at such time, to a judge of competent jurisdiction sitting in Suffolk County; except that for these purposes, the office of the attorney general shall be deemed to be located in Suffolk County.

H. Warrants: application how determined.

1. If the application conforms to paragraph F, the issuing judge may examine under oath any person for the purpose of determining whether probable cause exists for the issuance of the warrant pursuant to paragraph E. A verbatim transcript of every such interrogation or examination must be taken, and a transcription of the same, sworn to by the stenographer, shall be attached to the application and be deemed a part thereof.

2. If satisfied that probable cause exists for the issuance of a warrant the judge may grant the application and issue a warrant in accordance with paragraph *I*. The application and an attested copy of the warrant shall be retained by the issuing judge and transported to the chief justice of the superior court in accordance with the provisions of paragraph N of this section.

3. If the application does not conform to paragraph F, or if the judge is not satisfied that probable cause has been shown sufficient for the issuance of a warrant, the application must be denied.

I. Warrants: form and content.

A warrant must contain the following:

1. The subscription and title of the issuing judge; and

2. The date of issuance, the date of effect, and termination date which in no event shall exceed thirty days from the date of effect. The warrant shall permit interception of oral or wire communications for a period not to exceed fifteen days. If physical installation of a device is necessary, the thirty-day period shall begin upon the date of installation. If the effective period of the warrant is to terminate upon the acquisition of particular evidence or information or oral or wire communication, the warrant shall so provide; and

3. A particular description of the person and the place, premises or telephone or telegraph line upon which the interception may be conducted; and

4. A particular description of the nature of the oral or wire communications to be obtained by the interception including a statement of the designated offense to which they relate; and

5. An express authorization to make secret entry upon a private place or premises to install a specified intercepting device, if such entry is necessary to execute the warrant; and

6. A statement providing for service of the warrant pursuant to paragraph L except that if there has been a finding of good cause shown requiring the postponement of such service, a statement of such finding together with the basis therefor must be included and an alternative direction for deferred service pursuant to paragraph L, subparagraph 2.

J. Warrants: renewals.

1. Any time prior to the expiration of a warrant or a renewal thereof, the applicant may apply to the issuing judge for a renewal thereof with respect to the same person, place, premises or telephone or telegraph line. An application for renewal

must incorporate the warrant sought to be renewed together with the application therefor and any accompanying papers upon which it was issued. The application for renewal must set forth the results of the interceptions thus far conducted. In addition, it must set forth present grounds for extension in conformity with paragraph F, and the judge may interrogate under oath and in such an event a transcript must be provided and attached to the renewal application in the same manner as is set forth in subparagraph 1 of paragraph H.

2. Upon such application, the judge may issue an order renewing the warrant and extending the authorization for a period not exceeding fifteen (15) days from the entry thereof. Such an order shall specify the grounds for the issuance thereof. The application and an attested copy of the order shall be retained by the issuing judge to be transported to the chief justice in accordance with the provisions of subparagraph N of this section. In no event shall a renewal be granted which shall terminate later than two years following the effective date of the warrant.

K. Warrants: manner and time of execution.

1. A warrant may be executed pursuant to its terms anywhere in the commonwealth.

2. Such warrant may be executed by the authorized applicant personally or by any investigative or law enforcement officer of the commonwealth designated by him for the purpose.

3. The warrant may be executed according to its terms during the hours specified therein, and for the period therein authorized, or a part thereof. The authorization shall terminate upon the acquisition of the oral or wire communications, evidence or information described in the warrant. Upon termination of the authorization in the warrant and any renewals thereof, the interception must cease at once, and any device installed for the purpose of the interception must be removed as soon thereafter as practicable. Entry upon private premises for the removal of such device is deemed to be authorized by the warrant.

L. Warrants: service thereof.

1. Prior to the execution of a warrant authorized by this section or any renewal thereof, an attested copy of the warrant or the renewal must, except as otherwise provided in subparagraph 2 of this paragraph, be served upon a person whose oral or wire communications are to be obtained, and if an intercepting device is to be installed, upon the owner, lessee, or occupant of the place or premises, or upon the subscriber to the telephone or owner or lessee of the telegraph line described in the warrant.

2. If the application specially alleges exigent circumstances requiring the postponement of service and the issuing judge finds that such circumstances exist, the warrant may provide that an attested copy thereof may be served within thirty days after the expiration of the warrant or, in case of any renewals thereof, within thirty days after the expiration of the last renewal; except that upon a showing of important special facts which set forth the need for continued secrecy to the satisfaction of the issuing judge, said judge may direct that the attested copy of the warrant be served on such parties as are required by this section at such time as may be appropriate in the circumstances but in no event may he order it to be served later than three (3) years from the time of expiration of the warrant or the last renewal thereof. In the event that the service required herein is postponed in accordance with this paragraph, in addition to the requirements of any other paragraph of this section, service of an attested copy of the warrant shall be made upon any aggrieved person who should reasonably be known to the person who executed or obtained the warrant as a result of the information obtained from the interception authorized thereby.

3. The attested copy of the warrant shall be served on persons required by this section by an investigative or law enforcement officer of the commonwealth by leaving the same at his usual place of abode, or in hand, or if this is not possible by mailing the same by certified or registered mail to his last known place of abode. A return of service shall be made to the issuing judge, except, that if such service is postponed as provided in subparagraph 2 of paragraph L, it shall be made to the chief justice. The return of service shall be deemed a part of the return of the warrant and attached thereto.

M. Warrant: return.

Within seven days after termination of the warrant or the last renewal thereof, a return must be made thereon to the judge issuing the warrant by the applicant therefor, containing the following:

a. a statement of the nature and location of the communications facilities, if any, and premise or places where the interceptions were made; and

b. the periods of time during which such interceptions were made; and

c. the names of the parties to the communications intercepted if known; and

d. the original recording of the oral or wire communications intercepted, if any; and

e. a statement attested under the pains and penalties of perjury by each person who heard oral or wire communications as a result of the interception authorized by the warrant, which were not recorded, stating everything that was overheard to the best of his recollection at the time of the execution of the statement.

N. Custody and secrecy of papers and recordings made pursuant to a warrant.

1. The contents of any wire or oral communication intercepted pursuant to a warrant issued pursuant to this section shall, if possible, be recorded on tape or wire or other similar device. Duplicate recordings may be made for use pursuant to subparagraphs 2 (a) and (b) of paragraph D for investigations. Upon examination of the return and a determination that it complies with this section, the issuing judge shall forthwith order that the application, all renewal applications, warrant, all renewal orders and the return thereto be transmitted to the chief justice by such persons as he shall designate. Their contents shall not be disclosed except as provided in this section. The application, renewal applications, warrant, the renewal order and the return or any one of them or any part of them may be transferred to any trial court, grand jury proceeding of any jurisdiction by any law enforcement or investigative officer or court officer designated by the chief justice and a trial justice may allow them to be disclosed in accordance with paragraph D, subparagraph 2, or paragraph *O* or any other applicable provision of this section.

The application, all renewal applications, warrant, all renewal orders and the return shall be stored in a secure place which shall be designated by the chief justice, to which access shall be denied to all persons except the chief justice or such court officers or administrative personnel of the court as he shall designate.

2. Any violation of the terms and conditions of any order of the chief justice, pursuant to the authority granted in this paragraph, shall be punished as a criminal contempt of court in addition to any other punishment authorized by law.

3. The application, warrant, renewal and return shall be kept for a period of five (5) years from the date of the issuance of the warrant or the last renewal thereof at which time they shall be destroyed by a person designated by the chief justice. Notice prior to the destruction shall be given to the applicant attorney general or his successor or the applicant district attorney or his successor and upon a showing of good cause to the chief justice, the application, warrant, renewal, and return may be kept for such additional period as the chief justice shall determine but in no event longer than the longest period of limitation for any designated offense specified in the warrant, after which time they must be destroyed by a person designated by the chief justice.

O. Introduction of evidence.

1. Notwithstanding any other provisions of this section or any order issued pursuant thereto, in any criminal trial where the commonwealth intends to offer in evidence any portions of the contents of any interception or any evidence derived therefrom the defendant shall be served with a complete copy of each document and item which make up each application, renewal application, warrant, renewal order, and return pursuant to which the information was obtained, except that he shall be furnished a copy of any recording instead of the original. The service must be made at the arraignment of the defendant or, if a period in excess of thirty (30) days shall elapse prior to the commencement of the trial of the defendant, the service may be made at least thirty (30) days before the commencement of the criminal trial. Service shall be made in hand upon the defendant or his attorney by any investigative or law enforcement officer of the commonwealth. Return of the service required by this subparagraph including the date of service shall be entered into the record of trial of the defendant by the commonwealth and such return shall be deemed prima facie evidence of the service described therein. Failure by the commonwealth to make such service at the arraignment, or if delayed, at least thirty days before the commencement of the criminal trial, shall render such evidence illegally obtained for purposes of the trial against the defendant; and such evidence shall not be offered nor received at the trial notwithstanding the provisions of any other law or rules of court.

2. In any criminal trial where the commonwealth intends to offer in evidence any portions of a recording or transmission or any evidence derived therefrom, made pursuant to the exceptions set forth in paragraph B, subparagraph 4, of this section, the defendant shall be served with a complete copy of each recording or a statement under oath of the evidence overheard as a result of the transmission. The service must be made at the arraignment of the defendant or if a period in excess of thirty days shall elapse prior to the commencement of the trial of the defendant, the service may be made at least thirty days before the commencement of the criminal trial. Service shall be made in hand upon the defendant or his attorney by any investigative or law enforcement officer of the commonwealth. Return of the service required by this subparagraph including the date of service shall be entered into the record of trial of the defendant by the commonwealth and such return shall be deemed prima facie evidence of the service described therein. Failure by the commonwealth to make such service at the arraignment, or if delayed at least thirty days before the commencement of the criminal trial, shall render such service illegally obtained for purposes of the trial against the defendant and such evidence shall not be offered nor received at the trial notwithstanding the provisions of any other law or rules of court.

P. Suppression of evidence.

Any person who is a defendant in a criminal trial in a court of the commonwealth may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom, for the following reasons:

1. That the communication was unlawfully intercepted.

2. That the communication was not intercepted in accordance with the terms of this section.

3. That the application or renewal application fails to set forth facts sufficient to establish probable cause for the issuance of a warrant.

4. That the interception was not made in conformity with the warrant.

5. That the evidence sought to be introduced was illegally obtained.

6. That the warrant does not conform to the provisions of this section.

Q. Civil remedy.

Any aggrieved person whose oral or wire communications were intercepted, disclosed or used except as permitted or authorized by this section or whose personal or property interests or privacy were violated by means of an interception except as permitted or authorized by this section shall have a civil cause of action against any person who so intercepts, discloses or uses such communications or who so violates his personal, property or privacy interest, and shall be entitled to recover from any such person--

1. actual damages but not less than liquidated damages computed at the rate of $100 per day for each day of violation or $1000, whichever is higher;

2. punitive damages; and

3. a reasonable attorney's fee and other litigation disbursements reasonably incurred. Good faith reliance on a warrant issued under this section shall constitute a complete defense to an action brought under this paragraph.

R. Annual report of interceptions of the general court.

On the second Friday of January, each year, the attorney general and each district attorney shall submit a report to the general court stating (1) the number of applications made for warrants during the previous year, (2) the name of the applicant, (3) the number of warrants issued, (4) the effective period for the warrants, (5) the number and designation of the offenses for which those applications were sought, and for each of the designated offenses the following: (a) the number of renewals, (b) the number of interceptions made during the previous year, (c) the number of indictments believed to be obtained as a result of those interceptions, (d) the number of criminal convictions obtained in trials where interception evidence or evidence derived therefrom was introduced. This report shall be a public document and be made available to the public at the offices of the attorney general and district attorneys. In the event of failure to comply with the provisions of this paragraph any person may compel compliance by means of an action of mandamus.

Credits

Amended by St.1959, c. 449, § 1; St.1968, c. 738, § 1; St.1986, c. 557, § 199; St.1993, c. 432, § 13; St.1998, c. 163, §§ 7, 8.

Notes of Decisions (327)

M.G.L.A. 272 § 99, MA ST 272 § 99
Current through Chapter 46, except Chapter 41 of the 2019 1st Annual Session

End of Document

SENATE No. 1132

The Commonwealth of Massachusetts

REPORT

OF THE

SPECIAL COMMISSION ON

ELECTRONIC EAVESDROPPING

June, 1968

The Commonwealth of Massachusetts

THE COMMISSION'S MEMBERS

SEN. MARIO UMANA, *Chairman*

SEN. WILLIAM X. WALL, *Vice-Chairman*

SEN. WILLIAM I. RANDALL

REP. GEORGE SACCO

REP. DANIEL CARNEY

REP. NORMAN WEINBERG

REP. PHILIP KIMBALL

REP. ANDRE SIGOURNEY

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ELLIOT B. COLE

SANFORD A. KOWAL, *Chief Counsel*

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INTERIM REPORT OF THE SPECIAL COMMISSION TO INVESTIGATE ELECTRONIC EAVESDROPPING AND WIRETAPPING.

INTRODUCTION

A special commission to investigate electronic eavesdropping was created by the Legislature in 1964. During this period the Commission has held numerous public hearings, executive sessions and has directed its counsel to pursue research and investigation into the laws involving privacy, wiretapping and eavesdropping by law enforcement agencies, and problem of wiretapping and eavesdropping as it is committed by members of the general public.

Public hearings have been held by the Commission to demonstrate the type of eavesdropping devices presently available to members of the general public, and those used at the present time for covert wiretapping and eavesdropping. Public hearings were held to determine the extent and need for service observing as carried on by the New England Telephone and Telegraph Company.

RECENT UNITED STATES SUPREME COURT DECISIONS

Two recent cases decided by the United States Supreme Court clearly indicate that Sections 99, 100, 101, and 102 of Chapter 272 of the General Laws are unconstitutional insofar as they describe the methods by which law enforcement officers may be permitted to commit judicially authorized eavesdropping and wiretapping. In the case of *Berger v. State of New York* a statute very similar to the sections described above was held unconstitutional on its face. The Court found the provisions for obtaining a warrant were too broad and that the statute permitted a "continuous search". The United States Supreme Court for the first time made it clear in that case, that a judicially authorized eavesdrop or wiretap must conform to the Fourth Amendment of the United States Constitution.

This requirement means that an application for such a wiretap or eavesdrop order, to be valid under the Fourth Amendment, must conform to the same test of "probable cause" as is required for a search warrant. In addition the Court makes it clear that it desires close judicial supervision over all aspects of the process of

eavesdropping and wiretapping as it is performed by law enforcement officers.

The impact of these decisions is that the Massachusetts statute must be revised if police and law enforcement officials are to be able to lawfully intercept or wiretap any wire or oral conversations by members of the public under any circumstances.

DEVICES FOR WIRETAPPING AND EAVESDROPPING BY MEMBERS OF THE PUBLIC.

Our hearings and studies have made it clear that eavesdropping devices are readily available to members of the public from commercially available stores. A person with a minimal education in electronics can easily install these commercially available devices for purposes of illegally intercepting wire or oral communications. In addition to devices which are easily available on the commercial market, other devices of much greater sophistication are manufactured by persons specializing in covert wiretapping and eavesdropping.

Due to the ease with which these devices may be obtained and manufactured, and the great proliferation of these devices, it is the Commission's conclusion that there is no way to effectively prohibit their sale or manufacture.

As a result, the Commission has revised the present Massachusetts statute to strictly forbid electronic eavesdropping or wiretapping by members of the public. This has been made necessary due to the fact that only two convictions have been obtained in Massachusetts for wiretapping or eavesdropping to the Commission's knowledge.

SERVICE OBSERVING

As a result of an investigation conducted by this Commission, at a public hearing held pursuant to that investigation the first admission by any telephone and telegraph company was made, that for a long period of time, these companies have operated a service by which the telephone company has overheard the conversations of subscribers without their knowledge. Long distance calls were monitored by the telephone company up until 1956. Local calls were monitored up until 15 days prior to the investigation conducted by the Commission in 1966.

"Service observing" was justified by the telephone company in order for it to check the quality of transmission of conversations over its lines, to supervise its operators, to check on the response of its repair personnel to the calls made by subscribers. The testimony further indicated that at the present time there is no necessity to listen to any conversation by a subscriber. In addition, service observing of the operators was said not to be necessary beyond the point that the operator heard the connection made between the parties for the call. This is due to the fact that improved electronic devices enable the same checks to be made without the necessity for overhearing the conversation of the parties.

To this end the Commission recommends the amendment of the Act governing the regulation of telephone companies by the Department of Public Utilities to insure that the privacy of the subscribers' telephone conversations will be protected. In the system of regulation described by the proposed statute, the Department of Public Utilities is specifically designated to enforce these requirements. The standard of service observing as set forth by the Telephone Company in its testimony before the Commission are incorporated into the provisions of the proposed bill. The scheme of regulation requires an annual report to the Department of Public Utilities of all service observing activities by the Telephone Company, reporting of all rules and regulations of the Telephone Company concerning observing, a report of the amount of money expended for such service, and requires a semi-annual investigation of such service by the Department of Public Utilities.

This Commission feels that past conduct by the Telephone Company indicates that the Telephone Company has clearly favored its business interest against right of the public to have privacy in their telephone conservations. In addition, we take a dim view of a method of supervision which allows an employer to act as "big brother" towards its employees. As a result the Commission feels that a scheme of regulation by a public body with detailed statutory standards is required.

LAW ENFORCEMENT
EAVESDROPPING AND WIRETAPPING

The Commission feels that eavesdropping and wiretapping by

law enforcement officials should be permitted in order to effectively combat the menace of organized crime but only if such wiretapping and eavesdropping is limited by the standards set forth by the United States Supreme Court. This means that law enforcement eavesdropping and wiretapping should be strictly supervised by the judicial branch of the government and applications for eavesdropping and wiretapping must conform to the provisions of the Fourth Amendment.

The statute proposed by the Commission has revised the Massachusetts law to require strict compliance with the probable cause provisions of the Fourth Amendment. Wiretapping and eavesdropping by police officials will be limited to specified conversations and "continuous searches" will be prohibited. Applications for warrants must be made to a Justice of the Superior Court. The time limit of searches and warrants are strictly defined and are limited as required by the directions given in the decided cases.

In addition, the Commission's statute has centralized administration of police and law enforcement wiretapping in the Superior Court. As this is the chief trial court of the Commonwealth, and the tribunal which hears the most serious cases, it is hoped that there will be a better uniformity in the application of the law.

In addition, it is required that the original recording or tape or a sworn statement of the complete contents of the intercepted communication if there is no tape, be returned to the judge who issued the warrant so that he may determine whether or not the warrant has been executed in a manner in which he authorized it. This additional judicial supervision, it is hoped, will eliminate the possibility of abuse and add to the public's confidence in the manner in which this statute is employed by law enforcement officials.

The original tapes and statements are to be kept in the custody of the Chief Justice of the Superior Court. This provision has been added to eliminate the possibility of any editing between the time the tapes are obtained and the time they must be made available for trial. We feel this also aids the prosecutor in that the procedure eliminates false charges by a defendant that the tape had been edited or changed. It was felt by the Commission that this added control over the fruits of an interception will be a means of insuring the competence of the public in the system of judicially au-

thorized eavesdropping and wiretapping and a means of promoting confidence in the fairness of a trial in which such evidence is used.

The right of a defendant to be confronted with the evidence against him is protected in that any wiretap information to be used against the defendant must be shown to him prior to the trial.

Provisions are made for annual reports to the legislature describing the extent of wiretapping and eavesdropping conducted during the previous year by the judicial officers of the Commonwealth authorized to seek warrants for wiretapping under this bill.

PROHIBITION OF WIRETAPPING AND EAVESDROPPING BY THE PUBLIC

The Commission is of the opinion that wiretapping and eavesdropping other than by law enforcement officers should be strictly prohibited. The present Massachusetts laws have been revised in our proposed act to strictly prohibit electronic eavesdropping and wiretapping of other persons' conversations without permission. Penalties have been increased and the crimes have been more strictly defined. Possession of illegal wiretapping devices has been made a crime under circumstances evincing an intent to illegally use those devices.

PRIVATE INVESTIGATORS

It is the Commission's view that private investigators should not be permitted to make use of eavesdropping and wiretapping devices. To this end, the Commission recommends the amendment of the Act regulating private investigators in order that their licenses may be revoked in the event they are convicted of any violation of the new wiretapping and eavesdropping statutes.

Respectfully submitted,

MARIO UMANA, *Chairman*
ELLIOT B. COLE
WILLIAM P. HOMANS, JR.
ANDRE R. SIGOURNEY
NORMAN S. WEINBERG
PHILLIP K. KIMBALL

Commission Member Elliot B. Cole concurrs in the Commission's legislative recommendations.
Commission Member William P. Homans, Jr., joins Mr. Cole.

I join the majority of the Commission in their legislative recommendations, but I must add some comments on those provisions dealing with law enforcement eavesdropping and with "all-party consent".

In the past I have been a vigorous opponent of provisions which would permit law enforcement eavesdropping and wiretapping. This opposition has been based on both Constitutional considerations and the lack of information available on law enforcement eavesdropping practices.

Today I know no more than I did when I was appointed to this Commission about the practices and effectiveness of law enforcement eavesdropping. Indeed these two elements — practices and effectiveness — appear to be the most secret of all law enforcement secrets. As Prof. Alan Westin states in his treaties *Privacy and Freedom.*

> 'There has never been a detailed presentation by any law-enforcement agency, in terms that the educated public could judge, to prove this view (the need for wiretapping and eavesdropping in criminal investigations) on a crime-by-crime analysis,'

This Commission and Attorney General Richardson agree on the necessity of an annual report by the Commonwealth's prosecuting attorneys stating their activities in this area on a crime-by-crime basis. The secrecy of the past I believe is both destructive and alien to a democracy. It is the inclusion of the reporting provision, which was first put forth by the Attorney General, that has caused me to re-evaluate my previous opposition to law enforcement eavesdropping. It is to be hoped that the information contained in the prosecutor's annual report will provide a basis for the General Court to better evaluate its policy on law enforcement eavesdropping.

The other basis of my opposition to law enforcement eavesdropping has been its constitutionality. This controversy has raged within and without the United States Supreme Court since 1927 when that Court first decided the constitutionality of wiretapping.

In 1961, in *Silverman v. United States,* the Court indicated that eavesdropping under certain circumstances was violative of the Constitution. But recently, in *Berger v. New York,* the Court stated its tolerance for law enforcement eavesdropping given specific standards for judicial regulation. This Commission's Bill, as our Report explains, would implement those standards. If the Bill is not Constitutional and is enacted, I am sure that the Court will have an opportunity to so state.

The Commission have decided to recommend to the General Court a provision which would require the consent of all parties to a conversation before that conversation could be recorded or otherwise electronically 'intercepted'. It is the 'all-party consent' provision which is the essence of any protection which the law can afford the public.

But this view has not gained universal acceptance, and is opposed by those who see the possibility — what some of their number describe as the necessity — to secretly record the words of another. These advocates would maintain 'one-party consent', the present statutory standard. Their argument is based on the assumption that any participant in a conversation has the authority to divulge or publish the words and thoughts of his conversational partner. This assumption is ludicrous. If those participating in the conversation were mute and could only communicate via the written word, each participant would himself determine who had access to his thoughts. Furthermore, he could legally enforce his right by enjoining unauthorized publication of those thoughts.

The proponents of 'one-party consent' frequently justify their position by stating that every persons runs the risk that his confidence in the person to whom he is talking may be betrayed. This of course is true. But instead of protecting the individual from being betrayed, these proponents would legitimatize the betrayal. At the very least the individual should himself be able to determine who should have authority to mechanically reproduce his words.

Again I should like to rely on Prof. Westin. The first of the following passages is taken from that section of his book dealing with legislative provisions which would further protect the individual's right of privacy.

'(I) would *not* include an exception to allow wiretapping or eavesdropping with the consent of one party. This has been the basic charter for private-detective taps and bugs, for "owner" eavesdropping on facilities that are used by members of the public, and for much free-lance police eavesdropping. Allowing eavesdropping with the consent of one party would destroy the statutory plan of limiting the offenses for which eavesdropping by device can be used and insisting on a court-order process. And as technology enables every man to carry his micro-miniaturized recorder everywhere he goes and allows every room to be monitored surreptitiously by built-in equipment, permitting eavesdropping with the consent of one party would be to sanction a means of reproducing conversation that could choke off much vital social exchange.' (Emphasis in the original.)

The following passage is excerpted, with permission, from a letter to me from Prof. Westin on the advisability of incorporating the 'one-party consent' provision into a new Massachusetts statute.

'Based on the studies I have made on wiretapping and eavesdropping practices throught the United States, as reflected in my recently published book, *Privacy and Freedom* (New York: Atheneum, 1967), I believe such a provision is unwise. From a public policy standpoint, we must consider what would be the impact in the coming decade, when electronic monitoring devices spread even more widely in the population, of each citizen having to know that the person to whom he is talking in the office, at home, in his car, on the street, in a store, etc., may be recording the conservation with full legal authority and without having to have such clandestine recording authorized in advance by any judicial agency. I think this creates a serious inhibition on freedom of communication, especially because the person who chooses to speak frankly and freely in personal conversation runs the risk, under such a situation, that what he says in jest, with a wink, for its shock value on his conversational partner, or to test some belief held by the other party, can now be produced in evidence against him, with all the impact on the grand or petit jury, that we know such a tape recording exerts. In my book, I call this type of physical surveillance "surveillance by reproducibility." I quote from a 1958 opinion of the Bundesgerechtshof, West Germany's highest civil court, the dangers of this type of surveillance. The court states that "freedom and self-determination" are "essential to the development of [the individual's] personality." This freedom includes the right to decide for himself "whether his words shall be accessible solely to his conversation partner, to a particular group, or to the public, and, *a fortiori*, whether his voice shall be fixed on a record." The opinion notes further that the individual expresses his personality in private conversation, and has a right to do so freely, without distrust and suspicion. This expression of personality would disappear if individuals feared that their conversations, even their tone of voice, were secretly being recorded. Men would no longer be able to engage in natural, free discussion.'

It is clear to me that the passage of the Commissions Bill will protect the privacy of the individual while providing law enforcement agencies with the tools they feel are necessary in this technological era.

ELLIOT B. COLE
WILLIAM P. HOMANS, JR.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

PROJECT VERITAS ACTION FUND, Plaintiff, v. DANIEL F. CONLEY, in his Official Capacity as Suffolk County District Attorney, Defendant.	Civil Action No. 16-10462-PBS

MEMORANDUM AND ORDER

September 6, 2017

Saris, C.J.

Plaintiff Project Veritas Action Fund ("Project Veritas"), a news gathering organization, brings a motion for a preliminary injunction to enjoin Defendant Daniel F. Conley from enforcing the Massachusetts Wiretap Statute, Mass. Gen. Laws ch. 272, § 99 ("Section 99") on the ground that it violates the First and Fourteenth Amendments by prohibiting secret recording of the oral conversations of public officials engaged in their duties in public spaces. Defendant, the Suffolk County District Attorney, moves to dismiss on ripeness grounds.

The Court assumes familiarity with its previous ruling on Project Veritas' First Motion for Preliminary Injunction. Project Veritas Action Fund v. Conley, No. 16-CV-10462-PBS, 2017 WL 1100423 (D. Mass. Mar. 23, 2017). The Court also assumes familiarity with the companion case, Martin v. Evans, No. 16-CV-11362-PBS, 2017 WL 1015000 (D. Mass. Mar. 13, 2017).

After hearing, the Court **ALLOWS** the Motion to Dismiss without prejudice. Docket No. 72.

FACTUAL BACKGROUND

For the purpose of the motion to dismiss, the facts are taken as true, as alleged in the first amended verified complaint.

Project Veritas is a national media organization primarily engaged in undercover journalism. Its undercover newsgathering techniques involve recording and intercepting oral communications of persons without their knowledge or consent. This secret recording often occurs in public places such as polling places, sidewalks, and hotel lobbies. In 2014, Project Veritas used "undercover newsgathering" to discover "a stark contrast between the public statements of a candidate for United States Senate in Kentucky and the statements of her campaign staff." Docket No. 48 ¶ 23. In September 2015, Project Veritas "exposed campaign finance violations in New York using undercover techniques." Id. ¶ 24. It exposed "electoral

malfeasance" in Nevada using similar recording techniques. Id. ¶ 25. Most recently, it "detailed the weakness of voter registration laws in New Hampshire by focusing on the surreptitiously recorded statements of government officials." Id. ¶ 26.

Project Veritas has not previously engaged in any surreptitious recording in Massachusetts, though it wants to, because of a fear that utilizing undercover techniques in Massachusetts would expose it to criminal and civil liability under Section 99. Project Veritas hopes to undertake undercover investigation of public issues in Boston and throughout Massachusetts. Id. ¶ 30. Specifically, Project Veritas alleges that it would like to investigate and report on the public controversy over "sanctuary cities" in Massachusetts and more generally the motives and concerns of Boston public officials regarding immigration policy and deportation. Docket No. 48 ¶ 22, 30.

MOTION TO DISMISS STANDARD

Courts evaluate motions to dismiss for ripeness under Federal Rule of Civil Procedure 12(b)(1). See Downing/Salt Pond Partners, L.P. v. Rhode Island & Providence Plantations, 643 F.3d 16, 17 (1st Cir. 2011). In assessing the ripeness of Project Veritas' claim, the Court must take the complaint's well-pleaded facts as true and indulge all reasonable inferences

in its favor. Id. "In resolving a Rule 12(b)(1) motion, we may also consider other materials in the district court record, including where those materials contradict the allegations in the complaint." Id. Defendant did not seek discovery on the ripeness issue.

RIPENESS

"Article III restricts federal court jurisdiction to 'Cases' and 'Controversies.'" Reddy v. Foster, 845 F.3d 493, 499 (1st Cir. 2017) (citing U.S. Const. art. III, § 2). "Two of the limitation's manifestations are the justiciability doctrines of standing and ripeness, which are interrelated; each is rooted in Article III." Id. (citing Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 n.5 (2014) ("[T]he Article III standing and ripeness issues in this case 'boil down to the same question.'")). "Much as standing doctrine seeks to keep federal courts out of disputes involving conjectural or hypothetical injuries, the Supreme Court has reinforced that ripeness doctrine seeks to prevent the adjudication of claims relating to 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Id. (citing Texas v. United States, 523 U.S. 296, 300 (1998)). "'The facts alleged, under all the circumstances, must show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of' the

judicial relief sought." Id. (quoting Labor Relations Div. of Constr. Indus. of Mass., Inc. v. Healey, 844 F.3d 318, 326 (1st Cir. 2016)). "The plaintiff[] bear[s] the burden of alleging facts sufficient to demonstrate ripeness. Even a facial challenge to a statute is constitutionally unripe until a plaintiff can show that federal court adjudication would redress some sort of imminent injury that he or she faces." Id. at 501 (internal citations omitted).

The determination of ripeness depends on two factors: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Sindicato Puertorriqueño de Trabajadores v. Fortuño, 699 F.3d 1, 8 (1st Cir. 2012) (quoting Abbott Labs v. Gardner, 387 U.S. 136, 149 (1967), abrogated on other grounds by Califano v. Sanders, 430 U.S. 99 (1977)). "The fitness prong 'has both jurisdictional and prudential components.' The jurisdictional component of the fitness prong concerns 'whether there is a sufficiently live case or controversy, at the time of the proceedings, to create jurisdiction in the federal courts.'" Reddy, 845 F.3d at 501 (quoting Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 89 (1st Cir. 2013)). "The prudential component of the fitness prong concerns 'whether resolution of the dispute should be postponed in the name of judicial

restraint from unnecessary decision of constitutional issues.'" Id. (quoting Roman Catholic Bishop, 724 F.3d at 89).

"The hardship prong is wholly prudential and concerns the harm to the parties seeking relief that would come to those parties from our withholding of a decision at this time." Id. (internal citations omitted). "Generally, a 'mere possibility of future injury, unless it is the cause of some present detriment, does not constitute hardship.'" Sindicato, 699 F.3d at 9 (quoting Simmonds v. I.N.S., 326 F.3d 351, 360 (2d Cir. 2003)). "However, the Supreme Court has made clear that when a plaintiff alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" Id. (quoting Babbitt v. United Farm Workers Nat'l. Union, 442 U.S. 289, 298 (1979)). Most significant here, "when free speech is at issue, concerns over chilling effect call for a relaxation of ripeness requirements." Id. (quoting Sullivan v. City of Augusta, 511 F.3d 16, 31 (1st Cir. 2007)).

Project Veritas alleges that if not for Section 99, it would "investigate and report on the public controversy over 'sanctuary cities' in Massachusetts." Docket No. 48 ¶ 22. Specifically, "it would secretly investigate and record

government officials who are discharging their duties at or around the State House in Boston and other public spaces to learn about their motives and concerns about immigration policy and deportation." Docket No. 48 ¶ 22. James O'Keefe, President of Project Veritas, "verif[ied] under penalty of perjury under the laws of the United States of America that the factual statements contained in [Project Veritas'] First Amended Verified Complaint concerning [Project Veritas'] existing and proposed activities are true and correct." Docket No. 48 at 13. Project Veritas argues that it cannot provide any more specific details about whom it intends to record, where, when, and how frequently because it cannot know all the developments an investigation may involve.

At the hearing, Project Veritas admitted that it has not pursued investigation on "sanctuary cities" in other parts of the country. Project Veritas cites an article about Chicago Mayor Rahm Emanuel's suit against President Donald Trump to showcase the relevance of this topic –- a city in which surreptitious recording of police officers performing their duties in public places is protected, American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583, 586 (7th Cir. 2012), -- yet Project Veritas has not launched an investigation in Chicago.

Defendant Conley moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) arguing that Project Veritas' sparse allegations do not provide a factual basis fit for review and should be dismissed as unripe. See Ernst & Young v. Depositors Economic Protection Corp., 45 F.3d 530, 535 (1st Cir. 1995) (The issue presented must be "fit for review," an inquiry that typically involves "finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed."). Conley alleges that Project Veritas "has not pled the specific locations where it would make those recordings, how it would make them (except for surreptitiously), the content that it would capture, or whom it would record." Docket No. 73 at 6. He argues that without this specificity, Plaintiff's allegations do not provide the Court an opportunity to assess whether the proposed recordings would interfere with the public employees' ability to effectively perform her duties, a limitation this Court recognized in Martin. 2017 WL 1015000 at *8 ("The government also has a significant interest in restricting First Amendment activities that interfere with the performance of law enforcement activities or present legitimate safety concerns. Those significant interests may justify certain restrictions on audio and audiovisual recording of government officials' activities."); Alvarez, 679 F.3d at 607 ("It goes without saying

that the police may take all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations."). Without these facts, Conley argues, the Court would only be able to deal in hypotheticals, which is "patently advisory." Babbitt, 442 U.S. at 290. Conley does not argue that Project Veritas' claim is unripe under the second component of the ripeness analysis, hardship.

Project Veritas relies on the relaxed ripeness requirements as applied to First Amendment challenges to argue their claim is ripe for review -- "when free speech is at issue, concerns over chilling effect call for a relaxation of ripeness requirements." Sindicato, 699 F.3d at 9 (quoting Sullivan, 511 F.3d at 31 ("[W]hen First Amendment claims are presented, reasonable predictability of enforcement or threats of enforcement, without more, have sometimes been enough to ripen a claim."(internal citations omitted))). Project Veritas argues that the First Circuit "has been abundantly clear: where a credible threat of enforcement exists, a speaker need not even 'describe a plan to break the law or wait for a prosecution under it. . . . that injury, the chilling effect, is not only likely but has already come to pass.'" Docket No. 75 at 4 (quoting Mangual v. Rotger-Sabat, 317 F.3d 45, 60 (1st Cir. 2003)).

The First Circuit has stated that "when dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 15 (1st Cir. 1996). See generally Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014).

Section 99 is not a moribund law. Although there are no statistics in this record about how often persons are arrested or charged for a Section 99 violation, the Supreme Judicial Court reaffirmed the vitality of the statute in Commonwealth v. Hyde. 750 N.E.2d 963, 964 (Mass. 2001) (finding that an individual may be prosecuted under Section 99 for secretly tape recording statements made by police officers during a routine traffic stop). Moreover, when asked at the August 11, 2017 hearing on the motion to dismiss, Conley's counsel did not disavow enforcement of Section 99. See Blum v. Holder, 744 F.3d 790, 799 (1st Cir. 2014) (finding no standing where "the Government . . . disavowed any intention to prosecute plaintiffs for their stated intended conduct").

However, Project Veritas' claim that it intends to investigate and report on "sanctuary cities" in Massachusetts and secretly record government officials in effort to learn

about their motives and concerns about immigration policy and deportation is too vague and conclusory to pass muster under the plausibility standard. "The doctrine of ripeness . . . asks whether an injury that has not yet happened is sufficiently likely to happen to warrant judicial review." Mangual, 317 F.3d at 60 (citing Gun Owners Action League, Inc. v. Swift, 284 F.3d 198, 205 (1st Cir. 2012)). In this case, the claimed injury is the chilling effect on Project Veritas' First Amendment protected speech. See id. In the cases where the Court found this type of injury, the plaintiff seeking pre-enforcement review previously engaged in the activity prohibited under the statute. For example, in Mangual, the plaintiff, a newspaper reporter, had previously been threatened with prosecution under a Puerto Rico criminal libel statute for articles he published about government corruption and "state[d] an intention to continue covering police corruption and writing articles similar to those which instigated [a previous] threat of prosecution." Mangual, 317 F.3d at 58. In Martin, both plaintiffs had previously recorded their interactions with police officers. 2017 WL 1015000 at *1. In Sullivan, the First Circuit determined plaintiffs' challenge to a parade permit ordinance, which required 30-day advance notice, was ripe even though it had made a timely application for a permit because one plaintiff alleged he had not held a short-notice march because of the notice

requirement. 511 F.3d at 30-32. In Sindicato, the First Circuit held: "A party need not marshal all its resources and march to the line of illegality to challenge a statute on First Amendment grounds." 699 F.3d at 9. However, the Court pointed out that plaintiff union had alleged it had "taken steps in preparation to carry out those acts" in violation of the campaign finance law and had spent significant funds promoting certain campaign proposals. Id.

The law requires a plausible showing of true intent to investigate that has been chilled. See Labor Relations, 844 F.3d at 326 ("The burden to prove ripeness is on the party seeking jurisdiction. The pleading standard for satisfying the factual predicates for proving jurisdiction is the same as applies under Rule 12(b)(6) -- that is, the plaintiffs must state a claim to relief that is plausible on its face." (citation omitted)). "[A] 'claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Id. (quoting City of Fall River v. FERC, 507 F.3d 1, 6 (1st Cir. 2007)).

The Court concludes that even under the more relaxed ripeness standard afforded First Amendment protections, Project Veritas has not alleged sufficient immediacy, reality, or hardship to warrant judicial relief both as a constitutional or prudential matter. It alleges no plans, steps, expenditure of

funds, or past activities that plausibly suggest a present intent to launch a prohibited investigation. Project Veritas simply dashed off a possible investigation into sanctuary cities in Suffolk County to claim its First Amendment activities were chilled. The ripeness burden is not high but it is not non-existent even in the area of First Amendment protection.

ORDER

Pursuant to Fed. R. Civ. P. 12(b)(1), the Motion to Dismiss (Docket No. 72) is **ALLOWED** without prejudice.

/s/ PATTI B. SARIS
Patti B. Saris
Chief United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

K. ERIC MARTIN and RENÉ PÉREZ, Plaintiffs, v. WILLIAM GROSS, in his Official Capacity as Police Commissioner for the City of Boston, and DANIEL F. CONLEY, in his Official Capacity as District Attorney for Suffolk County, Defendants.	)	Civil Action No. 16-11362-PBS
PROJECT VERITAS ACTION FUND, Plaintiff, v. DANIEL F. CONLEY, in his Official Capacity as Suffolk County District Attorney, Defendant.	)	Civil Action No. 16-10462-PBS

MEMORANDUM AND ORDER

December 10, 2018

Saris, C.J.

INTRODUCTION

These two cases challenge the application of Mass. Gen. Laws ch. 272, § 99 ("Section 99") to secret audio recordings in

Massachusetts.[1] Section 99, in relevant part, criminalizes the willful "interception" of any "communication." Mass. Gen. Laws ch. 272, § 99(C)(1). An "interception" occurs when one is able "to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device" without the consent of "all parties to such communication." Mass. Gen. Laws ch. 272, § 99(B)(4). Thus, the statute does not apply to open (or non-secret) recording or to video recording (without audio). See id.; Commonwealth v. Hyde, 750 N.E.2d 963, 964 (Mass. 2001) (holding that Section 99 "strictly prohibits the secret electronic recording . . . of any oral communication").

The plaintiffs in Martin argue that Section 99 violates the First Amendment insofar as it prohibits the secret audio recording of police officers performing their duties in public. The plaintiff in Project Veritas makes a similar, though broader, argument: that Section 99 violates the First Amendment insofar as it prohibits the secret audio recording of government officials performing their duties in public. The parties in each

[1] The Court assumes familiarity with its earlier opinions in both cases. See Project Veritas Action Fund v. Conley, 270 F. Supp. 3d 337 (D. Mass. 2017); Project Veritas Action Fund v. Conley, 244 F. Supp. 3d 256 (D. Mass. 2017); Martin v. Evans, 241 F. Supp. 3d 276 (D. Mass. 2017).

case also clash over certain ancillary issues that are discussed in more detail below.

On the core constitutional issue, the Court holds that secret audio recording of government officials, including law enforcement officials, performing their duties in public is protected by the First Amendment, subject only to reasonable time, place, and manner restrictions. Because Section 99 fails intermediate scrutiny when applied to such conduct, it is unconstitutional in those circumstances.

FACTUAL BACKGROUND

The following facts, drawn from the summary judgment record in each case, are not subject to genuine dispute.

I. *Martin v. Gross*

A. The Parties

The plaintiffs K. Eric Martin and René Pérez are two private citizens who live in Jamaica Plain, Massachusetts. The defendants are Suffolk County District Attorney Daniel Conley and City of Boston Police Commissioner William Gross.[2]

B. The Plaintiffs' Secret Recordings

Since 2011, Martin has openly recorded police officers performing their duties in public at least 26 times; Pérez has

[2] In Martin, Commissioner Gross was automatically substituted for former Commissioner William Evans pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. In both cases, because Conley is no longer the district attorney, his replacement shall also be substituted upon notice.

done so 18 times, often live-streaming his recordings. The plaintiffs' recordings of police have included one-on-one interactions, traffic and pedestrian stops of others, and protests.[3] Between the two of them, the plaintiffs have wanted to secretly record police officers performing their duties in public on at least 19 occasions since 2011, but have refrained from doing so. Both have stated that their desire to record secretly stems from a fear that doing so openly will endanger their safety and provoke hostility from officers.

The plaintiffs have not advanced any specific plans or intentions to surreptitiously record police officers in the course of this litigation. But Pérez stated that he would not rule out secretly recording police officers in various sensitive situations and that he intended to live-stream any secret recordings he is permitted to make. Neither Martin nor Pérez has ever been arrested for violating Section 99.

C. Enforcement of Section 99

Since 2011, the Suffolk County District Attorney's Office ("SCDAO") has opened at least 11 case files that involve a felony charge under Section 99. These have included Section 99

[3] Two specific subsets of Martin's recordings are the subject of a motion to draw adverse inferences. These recordings depict interactions between police officers and citizens (1) in the vicinity of the Boston Common and (2) inside the Arizona BBQ restaurant in Roxbury. In his deposition, Martin refused to testify about these recordings, invoking the Fifth Amendment.

charges where the person recorded was a police officer performing her duties in public. During the same period, the Boston Police Department ("BPD") has applied for a criminal complaint on a Section 99 violation against at least nine individuals for secretly recording police officers performing their duties in public.[4]

When asked what governmental interest Section 99 advances, the district attorney asserted that it protects individuals' privacy rights -- specifically, the right of citizens and public officials alike to be on notice of when they are being recorded. Asked the same question, the police commissioner referred generally to Section 99, its legislative history, and judicial decisions interpreting the statute.

D. Police Training on Section 99

Section 99 is one of several topics on which BPD officers receive training. The methods of training include training bulletins, training videos, and in-service training. In all, BPD recruits receive 50 to 60 hours of criminal law instruction at the police academy. The instructor teaches from his own textbook, which touches on many, but not all, crimes under Massachusetts law. The text includes a segment on Section 99 -- one of over 150 sections discussing various criminal law topics.

[4] It is unclear on this record whether, or to what extent, the SCDAO and BPD Section 99 cases overlap.

BPD officers are also instructed using at least two other criminal law manuals that similarly include segments on Section 99 among 150 to 200 other criminal laws.

Furthermore, BPD has created a training video and a training bulletin related to Section 99. Since 2009, BPD has published 28 training videos; one of them related to Section 99. In recent years, BPD has disseminated 22 training bulletins. One of them is related to Section 99, and it has been circulated three times.

The video tells officers that Section 99 prohibits only secret recording. It depicts two scenarios of citizens recording police -- one openly and one in secret -- and instructs officers that the first is not a violation of Section 99, but the second is. The video became mandatory viewing for current officers. New recruits watch it as well.

The bulletin describes two court cases where defendants were convicted for secretly recording police officers performing their duties in public, instructing officers that they have a "right of arrest" whenever they have probable cause to believe an individual has secretly recorded a conversation. It was first circulated in November 2010, then again in October 2011, and most recently in May 2015. The 2011 and 2015 circulations are the only bulletins since 2011 that have required police commanders to read the bulletin aloud to their officers at roll

call. A memo accompanying the 2011 recirculation explicitly references the First Circuit decision in Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011), discussed in more detail below.

E. Procedural History

The Martin plaintiffs' claim, brought under 42 U.S.C. § 1983, alleged that Section 99 violates the First and Fourteenth Amendments as applied to the secret recording of police officers engaged in their duties in public places. Resolving a motion to dismiss, the Court held that the plaintiffs had adequately stated a claim that Section 99 violates the First Amendment. The Court also rejected a challenge to the plaintiffs' standing, held that the complaint adequately stated a claim for municipal liability, and held that Pullman abstention was unwarranted.

The defendants now challenge the claim on the grounds of standing, ripeness, and municipal liability. The district attorney also asks the Court to draw adverse inferences against Martin. The parties have filed cross-motions for summary judgment on the constitutional claim.

II. *Project Veritas Action Fund v. Conley*

A. The Parties

The plaintiff, Project Veritas Action Fund ("PVA"), is a nonprofit organization that engages in undercover journalism. The defendant is the Suffolk County District Attorney.

B. PVA's Secret Recording Practices

PVA has a history of investigating government officials, candidates for public office, and others through the use of secret recording. The organization also investigates suspected fraud, abuse, and corruption. PVA would like to secretly record government officials in Massachusetts, including when they make statements in public places while performing their public duties. PVA has refrained from doing so due to Section 99.

In general, PVA decides to investigate a story based on considerations like cost, time, level of public interest or newsworthiness, and the likelihood that it will obtain "candid information" from sufficiently high-level individuals. Once an investigation is assigned to a PVA reporter, he or she develops a "cover story" designed to develop trust with the source. The "cover story" is "rarely" true, but PVA enhances its verisimilitude by, for instance, creating fake email or social media accounts, printing false business cards, or creating a new business entity. Often the "cover story" involves volunteering or interning at a target organization, or donating to it. In other cases, PVA reporters use flattery, sex appeal, or romantic overtures to appeal to target sources.

PVA reporters use "sophisticated" recording equipment, including hidden necktie cameras, purse cameras, eyeglass cameras, and cameras whose lenses are small enough to fit into a

button or rhinestone. They have made recordings during campaign staff meetings, within a target's offices, and while meeting with representatives of a target organization. They have also recorded pretextual "dates" with target individuals and conversations at bars.

PVA's ultimate product is an edited "video report" that is released to the public via its website and/or YouTube channel. The final report leaves out portions of the raw footage. The record includes several examples of PVA's final reports and the raw footage used to create them.

In this case, PVA identifies four specific projects that it has refrained from conducting on account of Section 99. The projects involve secretly recording: (1) landlords renting unsafe apartments to college students; (2) government officials, including police officers, legislators, or members of the Massachusetts Office for Refugees and Immigrants, to ascertain their positions on "sanctuary cities"; (3) "protest management" activities by both government officials and private individuals related to Antifa protests; and (4) interactions with Harvard University officials to research its endowment and use of federal funds. PVA would like to send its journalists into Massachusetts to develop leads on these and other stories that may emerge.

C. Procedural History

PVA's original complaint challenged the constitutionality of Section 99 facially and as applied to it, targeting the statute's prohibition on secret recording in a public place (Count I) and secret recording of oral communications of individuals having no reasonable expectation of privacy (Count II). In March 2017, the Court dismissed PVA's claims insofar as they challenged the application of Section 99 to the secret recording of private conversations, and insofar as they presented facial and overbreadth challenges to Section 99. See Project Veritas Action Fund, 244 F. Supp. 3d at 264-66.

Having preserved its appellate rights as to those rulings, PVA has filed an amended complaint and has narrowed its claim to challenge only Section 99's application to the secret recording of government officials engaged in their duties in public spaces. The district attorney has moved to dismiss on ripeness grounds. Both parties seek summary judgment on the constitutional claim.

LEGAL BACKGROUND

I. Summary Judgment Standard

A party is entitled to summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he mere existence of some alleged factual

dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphases in original). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. A fact is material if it "might affect the outcome of the suit under the governing law." Id.

II. Setting the Scene: *Glik* and *Gericke*

The discussion that follows requires an understanding of two First Circuit decisions: Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011), and Gericke v. Begin, 753 F.3d 1 (1st Cir. 2014).

In Glik, the plaintiff was arrested for using his cell phone's digital video camera to openly film several police officers arresting someone on the Boston Common. 655 F.3d at 79, 87. He was recording audio as well as video on the cell phone. Id. at 80. The plaintiff was charged with violating Section 99 and two other state-law offenses. Id. at 79. These charges were later dismissed. Id. The plaintiff sued the police under 42 U.S.C. § 1983, claiming that his arrest for audio and video recording of the officers constituted a violation of his rights under the First and Fourth Amendments. Id. The police officers raised a qualified immunity defense. Id. A central issue on appeal was whether the arrest violated the plaintiff's First

Amendment rights -- in other words, "is there a constitutionally protected right to videotape police carrying out their duties in public?" Id. at 82.

The First Circuit answered affirmatively. Id. It held that the First Amendment's protection "encompasses a range of conduct related to the gathering and dissemination of information." Id. The First Amendment prohibits the government "from limiting the stock of information from which members of the public may draw." Id. (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978)).

> The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles. Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting "the free discussion of governmental affairs."

Id. (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)). This freedom of expression has particular significance with respect to law enforcement officials, "who are granted substantial discretion that may be misused to deprive individuals of their liberties." Id.

Although the First Circuit did not define "filming," Glik involved a cell phone used to record both audio and video. At least two of the cases cited in Glik involved both audio and video recording. See Fordyce v. City of Seattle, 55 F.3d 436,

439 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest" where plaintiff's videotaping of people on the streets of Seattle simultaneously captured audio); Demarest v. Athol/Orange Cty. Television, Inc., 188 F. Supp. 2d 82, 94-95 (D. Mass. 2002) (recognizing "constitutionally protected right to record matters of public interest" where a reporter was punished for broadcasting video and audio recordings of communication with government officials).

The First Circuit acknowledged that the right to record "may be subject to reasonable time, place, and manner restrictions." Id. at 84. But it did not explore those limitations because the plaintiff's conduct -- openly recording both audio and video of police arresting someone on the Boston Common -- "fell well within the bounds of the Constitution's protections." Id. It also held that the right was "clearly established," concluding that "a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment." Id. at 85.

More recently, in Gericke, a case involving an attempted open audiovisual recording of a late-night traffic stop, the First Circuit reiterated an individual's First Amendment right

to film police officers performing their duties carried out in public, subject to reasonable restrictions. 753 F.3d at 7. Therefore, "a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering or about to interfere with his duties." Id. The First Circuit repeated the admonition from Glik that police officers "are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights." Id. at 8 (quotation omitted).

Like Glik, Gericke did not directly address audio recording. However, it did rely on American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583, 607 (7th Cir. 2012), for the proposition that the First Amendment right to record may be subject to reasonable orders to maintain safety and control. Gericke, 753 F.3d at 7-8. Alvarez itself resonates with this case because it held that "[t]he act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." 679 F.3d at 595. This was due, in part, to the Seventh Circuit's observation "that audio and audiovisual recording are uniquely reliable and powerful methods of preserving and disseminating

news and information about events that occur in public. Their self-authenticating character makes it highly unlikely that other methods could be considered reasonably adequate substitutes." Id. at 607.

All of which is to say that the Court interprets Glik as standing for the proposition that the First Amendment protects the right to record audio and video of government officials, including law enforcement officers, performing their duties in public, subject only to reasonable time, place, and manner restrictions.

DISCUSSION

I. Preliminary Issues in *Martin v. Gross*

Before the paths of these two cases converge again, the Court must first address three preliminary issues that arise only in Martin.

A. Standing

In Martin, the police commissioner first argues that the plaintiffs lack standing to bring this case because their claims are speculative, the scope of the right they assert is amorphous, and their fear of arrest and prosecution is not caused by Section 99. The commissioner's line of argument is essentially identical to the one that the Court addressed, and rejected, in its prior opinion in this case. See Martin, 241 F. Supp. 3d at 281-83. There, the Court "easily conclude[d]" that

the plaintiffs intended to secretly record police if not for Section 99. Id. at 282. The Court found a credible threat of prosecution because "Section 99 is alive and well." Id. at 283. And the Court found causation and redressability satisfied because the alleged injury arose from the potential arrest and/or prosecution of the plaintiffs by BPD or the SCDAO. Id.

The current record only solidifies those conclusions because now, instead of allegations, the plaintiffs have provided facts that are not subject to genuine dispute. The commissioner points to nothing that would change the Court's analysis. The plaintiffs still have standing to bring this case.

B. Municipal Policy

1. Parties' Arguments

The police commissioner next argues that merely training police officers on how to enforce Section 99 is not a municipal policy for purposes of a § 1983 claim. More pointedly, he argues that even under the framework of Vives v. City of New York, 524 F.3d 346 (2d Cir. 2008), the record does not demonstrate a municipal "choice" to enforce Section 99. He also argues that the plaintiffs' fear of making secret recordings is caused by Section 99 itself, not by any municipal policy to enforce Section 99, and therefore the plaintiffs have failed to show a causal connection between any municipal policy and their alleged harm.

The plaintiffs argue that nothing requires BPD to enforce Section 99 against individuals who secretly record police. Therefore, enforcement of the law must be the result of a conscious policy choice by the city, as evidenced by repeated efforts to train officers on Section 99. The plaintiffs further argue that answering the question on the existence of a municipal policy simultaneously resolves the causation question.

2. Legal Standard

Local governments (and local officials sued in their official capacities) can be sued under § 1983 "for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658, 690 (1978). "[T]he word 'policy' generally implies a course of action consciously chosen from among various alternatives." City of Okla. City v. Tuttle, 471 U.S. 808, 823 (1985).

3. Analysis

The parties first dispute the appropriate legal standard for evaluating the existence of a "policy" for purposes of a Monell claim -- an issue on which courts have diverged. The plaintiffs argue that the Court should apply the Second Circuit's framework from Vives, as it did at the motion to

dismiss. Under Vives, the existence of a municipal "policy" depends on "(1) whether the City had a meaningful choice as to whether it would enforce [the statute in question]; and (2) if so, whether the City adopted a discrete policy to enforce [the statute in question] that represented a conscious choice by a municipal policymaker." 524 F.3d at 353. The police commissioner urges the Court to adopt the Seventh Circuit's decision in Surplus Store & Exchange, Inc. v. City of Delphi, which stated:

> It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the "policy" of enforcing state law. If the language and standards from Monell are not to become a dead letter, such a "policy" simply cannot be sufficient to ground liability against a municipality.

928 F.2d 788, 791–92 (7th Cir. 1991). The First Circuit has not weighed in on this question, aside from brief dicta in a concurrence that positively cited Surplus Store. See Yeo v. Town of Lexington, 131 F.3d 241, 257 (1st Cir. 1997) (Stahl, J., concurring).

Surplus Store does not govern here because the record demonstrates that BPD has done more than merely "enforc[e] state law." Rather, BPD has highlighted what it believes Section 99 allows (open recording of police officers) and does not allow (secret recording of police officers).

To show the existence of a municipal policy, the plaintiffs rely on an array of BPD training materials that discuss Section

99, including a video and a training bulletin. The roughly seven-minute video begins with a summary of the statute. It then reenacts two scenarios. In the first, a bystander holds up a cell phone and records police officers interacting with a couple arguing in the street. The video instructs that this does not constitute an "interception" under Section 99 because the bystander is openly, not secretly, recording the interaction. The second scenario parallels the facts of Commonwealth v. Hyde, 750 N.E.2d 963 (Mass. 2001), in which the SJC affirmed the Section 99 conviction of a defendant who surreptitiously recorded his conversation with police during a traffic stop. The video instructs officers that charges are appropriate in this scenario, although it emphasizes that, in order to violate Section 99, the recording "Must be SECRET!"

The bulletin, issued in November 2010, provides Section 99's definitions of "interception" and "oral communication," and breaks down the crime into elements. It also summarizes Hyde and Commonwealth v. Manzelli, 864 N.E.2d 566 (Mass. App. Ct. 2007), two Massachusetts appellate cases interpreting Section 99. The bulletin describes Section 99 as "designed to prohibit secret recordings of oral communications." It twice states, "Public and open recordings are allowed under the Wiretap statute. There is no right of arrest for public and open recordings under this statute."

The bulletin has been recirculated twice. In October 2011, the bulletin was accompanied by a memo from the Commissioner citing the Glik decision. The memo instructs officers that "public and open recording of police officers by a civilian is not a violation" of Section 99. The cover memo for the May 2015 recirculation "remind[s] all officers that civilians have a First Amendment right to publicly and openly record officers while in the course of their duties."

Section 99 is discussed in other training materials as well. For instance, the Municipal Police Training Committee, a state agency that sets minimum training standards for police academies in Massachusetts, discusses Section 99 in at least two training manuals used by the BPD. The record includes four additional manuals or texts that appear to discuss the statute as well.

These materials -- particularly the video and bulletin -- demonstrate why Surplus Store is inapt here. They instruct officers that Section 99 permits open, but not secret, recording of police officers' actions. But Glik did not clearly restrict itself to open recording. Rather, it held that the First Amendment provides a "right to film government officials or matters of public interest in public space." Glik, 655 F.3d at 84-85. The right is "fundamental and virtually self-evident," subject only to reasonable time, place, and manner restrictions.

Id. The BPD training materials narrowly read this holding, which amounts to more than mere enforcement of state law.

The same considerations demonstrate the existence of a policy under the two-prong Vives test. The parties do not dispute the first prong. That is, they seem to agree -- correctly -- that local police have discretion about whether and when to enforce Section 99. The second prong asks whether BPD has adopted a "discrete policy" to enforce Section 99 that "represent[s] a conscious choice by a municipal policymaker." Vives, 524 F.3d at 353. The police commissioner does not dispute that these training materials exist and have been disseminated to BPD personnel. Because there is no genuine dispute as to this factual basis for the alleged municipal policy, the only remaining question is one of law, appropriate for resolution on summary judgment: Do these training materials evince a "conscious choice" by BPD to enforce Section 99?

The answer is yes. Although an individual police officer retains discretion about whether to arrest someone for violating Section 99, the training materials cited above make clear that BPD "put flesh on the bones" of Section 99 and "apparently instructed officers that they could make arrests" for what the plaintiffs now claim was constitutionally protected conduct. Vives, 524 F.3d at 356. The video, bulletin, and manuals all speak with one voice regarding when Section 99 is and is not

violated. The Court concludes, as a matter of law, that this evidence demonstrates a "conscious choice" and amounts to a municipal policy for purposes of a Monell claim.

The police commissioner protests that BPD's guidance was in accordance with, and pursuant to, cases interpreting Section 99, and it is unfair to subject BPD to liability for trying to ensure that its officers comply with the law. He also argues that finding a municipal policy here will create "a perverse incentive not to train police officers." But the training materials go beyond telling officers when it is impermissible to arrest; taking a narrow construction of Glik, they also communicate that it is permissible to arrest for secretly audio-recording the police under all circumstances. In other words, it gives the green light to arrests that, as the Court holds below, are barred by Glik.

As the plaintiffs predicted, this analysis also resolves the causation question. "Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward." Bd. of Cty. Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 404 (1997). Here, the commissioner acknowledges that BPD's training materials were intended to ensure that officers complied with Glik. But Glik did not distinguish between First Amendment protection applicable to

audio and video recording. BPD's policymakers interpreted (in the Court's view, misinterpreted) the case as permitting arrest for secret audio recording in all circumstances without regard for the First Amendment interest at stake of police performing their duties in public. BPD's policies narrowly interpreting Glik caused the injury complained of in this case.

Accordingly, the Court concludes that the plaintiffs have proven the existence of a municipal policy and causation for purposes of their Monell claim against the police commissioner.

C. Adverse Inferences

1. Parties' Arguments

The district attorney argues that, for purposes of summary judgment, the Court should draw adverse inferences against Martin based on his refusal to answer certain questions during his deposition by invoking his Fifth Amendment privilege. The motion concerns two sets of videos produced in discovery: one from the Boston Common and one from the Arizona BBQ restaurant in Roxbury. The district attorney argues that he is prejudiced by Martin's assertion of the privilege because it prevents him from learning details about these videos, such as whether Martin created them, whether the recorder was holding the recording device in plain view, and whether the recorder had the subjects' permission to record. As a consequence, the district attorney asks the Court to make certain inferences about the videos --

for instance, that Martin did create them, that the recording device was not held in plain view, and that Martin did not have permission to record from persons in the videos.

Martin opposes the motion only in two respects. First, he seeks to ensure that none of the adverse inferences can be used in any criminal proceeding. Second, he opposes one specific inference -- that the Arizona BBQ restaurant is a "public place" for purposes of the plaintiffs' requested relief on their constitutional claim. He argues that this inference is outside the scope of his assertion of the Fifth Amendment privilege.

2. Legal Standard

In general, "'the Fifth Amendment does not forbid adverse inferences against parties in civil actions when they refuse to testify,' . . . nor does it mandate such inferences, especially as regards topics unrelated to the issues they refused to testify about." Mulero-Rodriguez v. Ponte, Inc., 98 F.3d 670, 678 (1st Cir. 1996) (quoting Baxter v. Palmigiano, 425 U.S. 308, 318 (1976)). Moreover, the First Circuit has "expressed doubt as to whether a court can draw [such an adverse] inference at the summary judgment stage, where all reasonable inferences must be drawn for the non-movant." In re Marrama, 445 F.3d 518, 522-23 (1st Cir. 2006).

3. Analysis

Because Martin opposes the inferences only in part, the Court generally allows the district attorney's motion. This comes with two caveats. First, as both parties seem to agree, the Court draws these inferences solely for the purpose of summary judgment in this case. Second, the Court agrees with Martin that the requested inference about the Arizona BBQ restaurant is outside the scope of his invocation of the Fifth Amendment privilege. That is, whether the Arizona BBQ restaurant constitutes a "public place" is a legal determination that likely would turn on facts outside the scope of any testimony Martin would offer on the topic. The district attorney's motion, therefore, is allowed in part and denied in part.

II. Ripeness

A. Parties' Arguments

In both cases, the district attorney moves to dismiss for lack of jurisdiction on the grounds that the case is unripe for judicial review. He argues that the plaintiffs' claims turn upon a host of fact-dependent considerations, but the plaintiffs have yet to develop a sufficient record to enable the Court to evaluate them.

The plaintiffs in Martin contend primarily that their claims do not turn on the factual considerations that the district attorney identifies. Even if they did, the plaintiffs

argue that they have provided plenty of facts to decide their respective cases. The plaintiff in Project Veritas argues that its history of secret recording activity in other states amply supports its intent to engage in the same conduct in Massachusetts and that this satisfies ripeness.

B. Legal Standard

Ripeness is an aspect of justiciability rooted in both the Article III case-or-controversy requirement and in prudential considerations. Reddy v. Foster, 845 F.3d 493, 500 (1st Cir. 2017). Its purpose is "to prevent the adjudication of claims relating to 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Id. (quoting Texas v. United States, 523 U.S. 296, 300 (1998)). As such, "plaintiffs bear the burden of alleging facts sufficient to demonstrate ripeness." Id. at 501. "Even a facial challenge to a statute is constitutionally unripe until a plaintiff can show that federal court adjudication would redress some sort of imminent injury that he or she faces." Id.

In general, the ripeness analysis has two prongs: fitness and hardship. Id. The fitness prong has both jurisdictional and prudential components. Id. The jurisdictional component of fitness asks "whether there is a sufficiently live case or controversy, at the time of the proceedings, to create jurisdiction in the federal courts." Id. (quoting Roman Catholic

Bishop of Springfield v. City of Springfield, 724 F.3d 78, 89 (1st Cir. 2013)). The prudential component of fitness concerns "whether resolution of the dispute should be postponed in the name of judicial restraint from unnecessary decision of constitutional issues." Id. (quoting Roman Catholic Bishop, 724 F.3d at 89). The hardship prong is not disputed here.

In the context of a First Amendment challenge like this one, Supreme Court and First Circuit precedent describes two types of cognizable injury. The first is when the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the statute, and there exists a credible threat of prosecution. Mangual v. Rotger-Sabat, 317 F.3d 45, 56–57 (1st Cir. 2003). The second is when a plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences. Id. at 57.

C. Analysis: Martin

The plaintiffs in Martin satisfy both aspects of fitness (the only ingredients of ripeness at issue here). The First Circuit has recognized that, "though not unqualified, a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment." Glik, 655 F.3d at 85. Both

plaintiffs have attested to their prior recordings of police officers. The plaintiffs aver that they desire to secretly record police officers but have refrained from doing so because of Section 99. And the defendants have sought criminal complaints or charged persons for violating Section 99 numerous times since 2011. In this case and its companion, the government has not disavowed enforcement of Section 99. See Project Veritas Action Fund, 270 F. Supp. 3d at 342; Martin, 241 F. Supp. 3d at 283.

These facts give rise to a live controversy over genuine First Amendment injuries. Therefore, both the jurisdictional and prudential components of fitness are satisfied. That is, the plaintiffs have shown "a sufficiently live case or controversy . . . to create jurisdiction in the federal courts," while also satisfying the Court that resolution of the case need not (indeed, ought not) be postponed. Reddy, 845 F.3d at 501 (quoting Roman Catholic Bishop, 724 F.3d at 89). This conclusion is bolstered by the principle that "courts sometimes exhibit a greater willingness to decide cases that turn on legal issues not likely to be significantly affected by further factual development." Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 536 (1st Cir. 1995). Such is the case here.

Many of the district attorney's arguments about an underdeveloped factual record seem to relate to his concern that

secret recordings could somehow endanger police officers or the public. This concern is not directly relevant to the issue of fitness. Moreover, nothing in Glik or in the relief sought by these plaintiffs would prohibit an officer from taking reasonable steps to preserve public safety. See Glik, 655 F.3d at 84 (noting that right to record "may be subject to reasonable time, place, and manner restrictions"); cf. Gericke, 753 F.3d at 8 ("[A]n individual's exercise of her First Amendment right to film police activity carried out in public . . . necessarily remains unfettered unless and until a reasonable restriction is imposed or in place."); Alvarez, 679 F.3d at 607 (noting that First Amendment right to record does not prevent officers from "tak[ing] all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations").

D. Analysis: Project Veritas

The undisputed facts in Project Veritas show a live controversy over, at a minimum, whether the plaintiff has been "chilled from exercising [its] right to free expression or [has] forgo[ne] expression in order to avoid enforcement consequences." Mangual, 317 F.3d at 57. It is beyond dispute that PVA has used secret audiovisual recording in the past. This has included secret audiovisual recording of government officials, such as New Hampshire voting officials during the

2016 primaries, and of private citizens, such as those depicted in PVA's recordings during the August 2017 protests in Charlottesville, Virginia. Further, according to PVA, Glik extends to secret recording, and therefore Section 99 chills them from engaging in protected conduct. The district attorney disagrees that the right recognized in Glik covers secret audio recording. The Court needs no additional facts to resolve that legal dispute. See Ernst & Young, 45 F.3d at 536 (describing how courts often "exhibit a greater willingness to decide cases that turn on legal issues not likely to be significantly affected by further factual development").

The district attorney further emphasizes deposition testimony where PVA's designated witness, when asked whether PVA had any present intentions of secretly recording in Massachusetts, stated:

> Not in Massachusetts, no, that would be against the law. We can't do that. I would love to probably secretly record a whole bunch of people because that's what I do. I think it is a very important and valuable kind of journalism. We don't have any plans to because we can't. It's against the law, and we don't break the law.

The district attorney is correct that this testimony undercuts a specific threat-of-prosecution injury, since the witness admitted not having a current "intention to engage in a course of conduct arguably affected with a constitutional interest." Mangual, 317 F.3d at 56. But by the same token, this testimony

is unmistakable evidence that Section 99 has "chilled [PVA] from exercising [its] right to free expression" and that PVA is "forgo[ing] expression in order to avoid enforcement consequences." Id. at 57.

The district attorney also asserts that ripeness requires additional details about PVA's foregone investigations. But for many of the same reasons just discussed with respect to Martin, the First Circuit has not indicated that the right to record is as fact-bound as the district attorney suggests. In addition, waiting for additional details to develop on a case-by-case basis could exacerbate the "pull toward self-censorship" that First Amendment pre-enforcement review is supposed to avoid. See N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 13-14 (1st Cir. 1996).

That said, the four investigations that PVA proposes are described with such sparse detail that they could encompass a vast array of settings and subjects for secret recording. The breadth of potential conduct involved, none of which has actually occurred, creates serious ripeness concerns. See Texas v. United States, 523 U.S. at 300; Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979). On this score, PVA has narrowed the scope of its summary judgment motion to only those applications of Section 99 that involve the recording

of government officials performing their duties in public.[5] Significantly, PVA's challenge remains broader than the one in Martin, which challenges the statute only with respect to the secret recording of police officers. But with respect to Project Veritas, the Court's ensuing analysis will focus solely on PVA's "government officials" claim. That claim is ripe to the extent just discussed, and the motion to dismiss is denied.

III. First Amendment Challenge

On the core constitutional question, the parties contest three issues: (1) whether to treat the plaintiffs' claims as "facial" or "as applied" challenges; (2) whether Section 99 is subject to strict scrutiny, intermediate scrutiny, or rational basis review; and (3) whether Section 99 survives whatever level of constitutional scrutiny governs. The Court addresses each of those issues before turning to a few loose ends.

A. "Facial" or "As Applied" Challenge

The parties dispute whether the plaintiffs' First Amendment claims are "as applied" or "facial" in nature. As sometimes

[5] In part, this was in recognition of the fact that the Court has already dismissed PVA's claims insofar as they pertain to private individuals. See Project Veritas Action Fund, 244 F. Supp. 3d at 265 (holding that Section 99 survives intermediate scrutiny insofar as it permits only non-secret recording of private conversations). Although PVA continues to advance some of those arguments (e.g., by now arguing that Section 99 is unconstitutionally overbroad and is unconstitutional whenever the subject of a recording lacks a reasonable expectation of privacy), the Court has already rejected them.

occurs, the claims in these cases "obviously [have] characteristics of both." John Doe No. 1 v. Reed, 561 U.S. 186, 194 (2010). They are "as applied" in the sense that the plaintiffs only challenge Section 99 insofar as it applies to the secret recording of police officers (in Martin) or government officials (in Project Veritas) performing their duties in public. They are "facial" in the sense that the relief sought in both cases would block the application of Section 99 to any situation involving the secret recording of police officers or government officials performing their duties in public, not just in a specific instance of the plaintiffs engaging in such conduct.

The Supreme Court faced a similar situation in Reed and instructed that "[t]he label is not what matters." 561 U.S. at 194. Rather, the point of inquiry is whether the claim and the relief that would follow "reach beyond the particular circumstances of [the] plaintiffs" in the case. Id. If so, the plaintiffs must satisfy the "standards for a facial challenge to the extent of that reach." Id.; see also Showtime Entm't, LLC v. Town of Mendon, 769 F.3d 61, 70 (1st Cir. 2014) (applying Reed to hold that a strip club's challenge to a town's zoning laws was facial because the club sought to invalidate the zoning laws, not merely to change the way those laws applied to the club).

Here, there is no genuine dispute that the relief the plaintiffs seek in both cases "reach[es] beyond [their] particular circumstances." Reed, 561 U.S. at 194. Specifically, the plaintiffs all seek to partially invalidate Section 99. Thus, under Reed, their claim is facial to a certain extent. However, there are only two "set[s] of circumstances" at issue: the secret recording of police officers performing their duties in public, and the secret recording of government officials doing the same. That is the limited "extent" of the facial challenges in these cases. See id.

B. Level of Constitutional Scrutiny

The parties also dispute the appropriate level of constitutional scrutiny. PVA argues that Section 99 is a content-based restriction on expression because it primarily injures undercover journalists, and therefore strict scrutiny should apply. This argument is easily dispatched. A content-based restriction is one that "applies to particular speech because of the topic discussed or the idea or message expressed." Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) (emphasis added). Section 99 does not do this. Rather, in the scenarios at issue here -- the secret recording of police officers or other government officials performing their duties in public -- Section 99 acts as a content-neutral restriction on conduct that, under Glik, is protected by the First Amendment

(for citizens and journalists alike). See Jean v. Mass. State Police, 492 F.3d 24, 29 (1st Cir. 2007) (noting that Section 99 "is a content-neutral law of general applicability" (internal quotation marks omitted)). Thus, intermediate scrutiny applies. See Rideout v. Gardner, 838 F.3d 65, 71-72 (1st Cir. 2016) ("Content-neutral restrictions are subject to intermediate scrutiny . . . ."), cert. denied, 137 S. Ct. 1435 (2017). The plaintiffs in Martin agree that this standard governs here.

Finally, the district attorney suggests in a footnote that a standard lower than intermediate scrutiny "might" apply. He does not convincingly develop this argument, and neither Glik nor Jean supports it. See 655 F.3d at 82-84; 492 F.3d at 29.

C. Intermediate Scrutiny

Intermediate scrutiny requires that the law be "narrowly tailored to serve a significant government interest." Rideout, 838 F.3d at 72 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). In this context, narrow tailoring does not require that the law be the least restrictive or least intrusive means of serving the government's interests. Id. However, it requires a "close fit between ends and means" and dictates that the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." McCullen v. Coakley, 134 S. Ct. 2518, 2534-35 (2014). The law also must "leave open ample

alternative channels for communication of the information." Ward, 491 U.S. at 791.

The defendants state that the purpose of Section 99 is to ensure that all citizens -- government officials and private citizens alike -- receive "guaranteed notice of being recorded, so that one can respond appropriately." The defendants describe this as a privacy interest of both the government officials and the private individuals with whom they interact.[6]

The argument that Section 99 protects privacy interests is consistent with case law from the Massachusetts Supreme Judicial Court, which has stated that Section 99 "was designed to prohibit the use of electronic surveillance devices by private individuals because of the serious threat they pose to the 'privacy of all citizens.'" Hyde, 750 N.E.2d at 967-68 (quoting Mass. Gen. Laws ch. 272, § 99). Generally speaking, protection of individual privacy is a legitimate and significant government interest. See Bartnicki v. Vopper, 532 U.S. 514, 532 (2001) ("Privacy of communication is an important interest . . . .");

[6] The district attorney also suggests that this interest falls within the First Amendment's protection against compelled participation in the expressive conduct of another. In other words, if notice of recording permits a person to modulate her behavior to account for the recording, a lack of notice forces the person to unknowingly participate in the expressive conduct (here, recording) of another. Conley cites no case that applies this "compelled participation" line of First Amendment jurisprudence in a right-to-record dispute, and the First Circuit has not done so in its recent explorations of the topic (i.e., Gericke and Glik).

cf. Frisby v. Schultz, 487 U.S. 474, 484 (1988) (recognizing protection of residential privacy as a "significant government interest" for purposes of First Amendment claim).

The Martin plaintiffs contend that allowing police officers to "respond appropriately" to notice of recording will permit them to alter any inappropriate behavior. They point to the important First Amendment interest in monitoring the conduct of law enforcement officials. In Glik, the First Circuit recognized the First Amendment's protection for information-gathering has special force with respect to law enforcement officials who are granted so much discretion in depriving individuals of their liberties. See 655 F.3d at 83. But the same basic interest applies generally to government officials: "Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally." Glik, 655 F.3d at 82-83 (citations omitted).

The Court holds that Section 99 is not narrowly tailored to protect a significant government interest when applied to law enforcement officials discharging their duties in a public place. See id. at 84 ("In our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights."). The same goes for other government officials performing their duties in public.

Id. at 82-83, 85; see Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) ("An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties.").

This is not to say that police and government officials have no privacy interests. However, the diminished privacy interests of government officials performing their duties in public must be balanced by the First Amendment interest in newsgathering and information-dissemination. The First Amendment prohibits the "government from limiting the stock of information from which members of the public may draw." Bellotti, 435 U.S. at 783. "An important corollary to this interest in protecting the stock of public information is that '[t]here is an undoubted right to gather news from any source by means within the law.'" Glik, 655 F.3d at 82 (quoting Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978)) (internal quotation marks omitted).

The First Circuit has recognized that "[t]he filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles." Id.; see also Alvarez, 679 F.3d at 595 (recognizing audio and audiovisual

recording as among forms of information-gathering protected by First Amendment). Based on this case law, the Court holds that the First Amendment protects both audio and video recording. Because "the public's right of access to information is coextensive with that of the press," this right inures to individual citizens and journalists alike. Glik, 655 F.3d at 83. The right "may be subject to reasonable time, place, and manner restrictions," although Glik does not discuss what those restrictions might entail. Id. at 84.

Here, the defendants counter with several hypotheticals that might implicate individual privacy or public safety issues -- for instance, when an officer meets with a confidential informant or encounters a crime victim on the street. But these examples miss the mark. When such situations arise, police are free to "take all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations." Alvarez, 679 F.3d at 607; see also Glik, 655 F.3d at 84 ("[T]he right to film . . . may be subject to reasonable time, place, and manner restrictions."). Nothing in the relief these plaintiffs seek would require otherwise. If an officer needs to protect the safety of an informant or her fellow officers, or seeks to preserve conversational privacy with a victim, the officer may order the recording to stop or to conduct the conversation at a

safe remove from bystanders or in a private (i.e., non-public) setting. See Alvarez, 679 F.3d at 607. ("Police discussions about matters of national and local security do not take place in public where bystanders are within earshot . . . ."). A reasonable restriction would remove the conversation from the scope of the relief sought (and ordered) in this case.

In short, Section 99 prohibits all secret audio recording of any encounter with a law enforcement official or any other government official. It applies regardless of whether the official being recorded has a significant privacy interest and regardless of whether there is any First Amendment interest in gathering the information in question. "[B]y legislating this broadly -- by making it a crime to audio record any conversation, even those that are not in fact private -- the State has severed the link between [Section 99's] means and its end." Alvarez, 679 F.3d at 606. The lack of a "close fit" between means and end is plain. See McCullen, 134 S. Ct. at 2534-35.

Further, "[b]ecause [Section 99] is not closely tailored to the government's interest in protecting conversational privacy, [the Court] need[s] not decide whether it leaves open adequate alternative channels for this kind of speech." Alvarez, 679 F.3d at 607. Even if it reached that issue, however, the "self-authenticating character" of audio recording "makes it highly

unlikely that other methods could be considered reasonably adequate substitutes." Id.

D. Loose Ends

Some difficult questions remain about what constitutes a "public space" and who is considered a "government official" for purposes of the right to record. The facts of Glik provide some guidance on the "public space" issue. There, the recording took place on the Boston Common, "the apotheosis of a public forum" in which "the rights of the state to limit the exercise of First Amendment activity are 'sharply circumscribed.'" Glik, 655 F.3d at 84 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). Many of the police-involved scenarios that the plaintiffs desire to secretly record would occur in similar locations -- traditional public forums like parks, streets, and sidewalks. See Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018) (describing framework for traditional public forums, designated public forums, and nonpublic forums); Gericke, 753 F.3d at 7 (extending the right to record to traffic stops). It seems clear enough from Glik and Gericke that the right to record a government official, including a law enforcement official, performing her duties generally applies in public forums.

But the holding of Glik uses the phrase "public space," not "public forum." 655 F.3d at 85. The plaintiffs in Martin believe

the right to secretly record the police extends to private property that is open to the general public, such as a restaurant. For example, one of Martin's recordings of police activity occurred at the Arizona BBQ restaurant from a vantage point on the sidewalk outside the restaurant. In general, though, the First Amendment does not guarantee a right to free expression on private property. See Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976) (holding that federal constitution did not protect employees' right to picket inside shopping center).

Moreover, there is a definitional issue with Glik's use of the term "government official." Glik, Gericke, and cases cited therein teach that a police officer falls within the ambit of "government official." But who are these other government officials? The First Amendment doctrine surrounding "public officials" may provide some guidance. See, e.g., Mangual, 317 F.3d at 65-66 (describing how definition of "public official" has evolved to "include[] many government employees, including police officers").

The parties did not focus on defining "public space" or "government official," and it is not prudential, under the ripeness doctrine, to do so now. While Glik's use of the term "public space" seems to indicate something broader than "public forum," and its use of the term "government official" includes a broader scope of public official than "law enforcement officer,"

the Court leaves it to subsequent cases to define these terms on a better record.

CONCLUSION

Consistent with the language of Glik, the Court holds that Section 99 may not constitutionally prohibit the secret audio recording of government officials, including law enforcement officials, performing their duties in public spaces, subject to reasonable time, manner, and place restrictions.

ORDER

In Martin, the motion for adverse inferences (Dkt. No. 115) is **ALLOWED IN PART** and **DENIED IN PART**. The plaintiffs' motion for summary judgment (Dkt. No. 121) is **ALLOWED**. The defendants' motion to dismiss for lack of jurisdiction and motions for summary judgment (Dkt. Nos. 110, 111, and 116) are **DENIED**.

In Project Veritas, the motion to dismiss on ripeness grounds (Dkt. No. 112) is **DENIED**. The motions for summary judgment (Dkt. Nos. 101, 117, and 126) are **ALLOWED IN PART** and **DENIED IN PART**.

The Court declares Section 99 unconstitutional insofar as it prohibits audio recording of government officials, including law enforcement officers, performing their duties in public spaces, subject to reasonable time, place, and manner restrictions. The Court will issue a corresponding injunction

against the defendants in these actions. The parties shall submit a proposed form of injunction by January 10, 2019.

/s/ PATTI B. SARIS
Patti B. Saris
Chief United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

K. ERIC MARTIN and RENÉ PÉREZ, Plaintiffs, v. WILLIAM GROSS, in His Official Capacity as Police Commissioner for the City of Boston, and RACHAEL ROLLINS, in Her Official Capacity as District Attorney for Suffolk County, Defendants.	Civil Action No. 16-11362-PBS
PROJECT VERITAS ACTION FUND, Plaintiff, v. RACHAEL ROLLINS, in Her Official Capacity as Suffolk County District Attorney, Defendant.	Civil Action No. 16-10462-PBS

MEMORANDUM AND ORDER

May 22, 2019

Saris, C.J.

INTRODUCTION

In these two actions, Plaintiffs challenged the constitutionality of Mass. Gen. Laws ch. 272, § 99 ("Section

99"), which, among other things, prohibits secret audio recordings of government officials in Massachusetts.[1] On December 10, 2018, the Court allowed Plaintiffs' motions for summary judgment in both cases and declared that Section 99 violates the First Amendment insofar as it prohibits the secret audio recording of government officials, including law enforcement officers, performing their duties in public spaces, subject to reasonable time, place, and manner restrictions. Martin v. Gross, 340 F. Supp. 3d 87, 109 (D. Mass. 2018). The Court directed the parties to submit a proposed form of injunction. Id. Defendants, the Suffolk County District Attorney and the Police Commissioner for the City of Boston, now argue that a permanent injunction is not necessary, and a declaratory judgment is sufficient. Defendants also ask the Court to narrow the scope of its previous ruling, for example, by defining "government officials" and "public space."

For the reasons discussed below, the Court agrees that a declaratory judgment is sufficient to give effect to the Court's ruling but declines the request to narrow the holding.

[1] The Court assumes familiarity with its earlier opinions in both cases. See Martin v. Gross, 340 F. Supp. 3d 87 (D. Mass. 2018); Project Veritas Action Fund v. Conley, 270 F. Supp. 3d 337 (D. Mass. 2017); Project Veritas Action Fund v. Conley, 244 F. Supp. 3d 256 (D. Mass. 2017); Martin v. Evans, 241 F. Supp. 3d 276 (D. Mass. 2017).

DISCUSSION

Defendants argue that the Court should enter a declaratory judgment that fixes the bounds of constitutionally permissible conduct rather than issue an injunction. They contend that a declaratory judgment is a less drastic, non-coercive remedy that will have the same practical effect as an injunction and will better comport with the principles of federalism and comity. They also argue for various provisions not contained in the Court's December 10 order, including: (1) a definition of "public space" as "a traditional or designated public forum"; (2) a more robust definition of "government official"; and (3) an affirmative declaration that Section 99 is still enforceable against a person who surreptitiously records the communications of someone other than a "government official."

1. Declaratory Judgment or Injunction

The first question is whether the Court should issue a declaratory judgment rather than an injunction. The Supreme Court has explained that Congress enacted the Declaratory Judgment Act (codified at 28 U.S.C. §§ 2201-02) to create a form of relief "to act as an alternative to the strong medicine of the injunction and to be utilized to test the constitutionality of state criminal statutes in cases where injunctive relief would be unavailable." Steffel v. Thompson, 415 U.S. 452, 466 (1974). Although the practical effect of the two forms of relief

is ordinarily the same, see Samuels v. Mackell, 401 U.S. 66, 73 (1971), a declaratory judgment is a "milder form of relief" because it is not coercive, i.e., noncompliance will not result in contempt proceedings, Steffel, 415 U.S. at 471; see also Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) ("At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary.").

In some cases where a constitutional challenge to the validity of a state or local statute or regulation has been successful, the First Circuit has approved the entry of injunctive relief. See Cutting v. City of Portland, 802 F.3d 79, 81 (1st Cir. 2015); Mangual v. Rotger-Sabat, 317 F.3d 45, 69 (1st Cir. 2003); see also Nationalist Movement v. City of Boston, 12 F. Supp. 2d 182, 195 (D. Mass. 1998) (entering permanent injunction barring enforcement of city ordinance regulating parade permitting after the court held the regulation was facially invalid). But in other cases where the validity of a state or local statute or regulation is at issue, courts in this district have issued declaratory judgments rather than permanent injunctions. See, e.g., McLaughlin v. City of Lowell, 140 F. Supp. 3d 177, 197 & n.16 (D. Mass. 2015) (in facial

challenge to city's anti-panhandling ordinance, declaring ordinance unconstitutional but declining to enter separate injunction to similar effect); Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Worcester, 851 F. Supp. 2d 311, 321 n.5 (D. Mass. 2012) (in facial challenge to city's prohibition on advertising of tobacco products, declaring ordinance unconstitutional but declining to enter separate injunction to similar effect); Canterbury Liquors & Pantry v. Sullivan, 16 F. Supp. 2d 41, 51 (D. Mass. 1998) (declaring state statute relating to the pricing of wholesale liquor was preempted by the Sherman Act but declining to enter separate injunction to similar effect); S. Bos. Allied War Veterans Council v. City of Boston, 875 F. Supp. 891, 920 (D. Mass. 1995) (in as-applied challenge to city's parade permitting policy, declaring that permitting requirements for St. Patrick's Day parade violated the Constitution but declining to enter separate injunction to similar effect); Mass. Gen. Hosp. v. Sargent, 397 F. Supp. 1056, 1057, 1063 (D. Mass. 1975) (declaring that state policy of failing to make prompt and full payments under the federal Social Security program violated Article VI of the U.S. Constitution but declining to enter injunction to similar effect).

The Court holds that a declaratory judgment is more appropriate than a permanent injunction in this case for two

reasons. First, the Court has held that Section 99 is invalid as applied to the secret audio recording of government officials, "subject to reasonable time, place, and manner restrictions." Martin, 340 F. Supp. 3d at 109. Because there is room for disagreement about whether a restriction is reasonable, the threat of contempt for violation of the injunction is too blunt and coercive an enforcement mechanism in situations where decision-making is necessarily split second. Second, the Court has not defined the meaning of "public space" or "government official." The issuance of an injunction could effectively implicate a judicial second-guessing of the policing function to determine whether the order was violated. Cf. Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 782 (7th Cir. 2010) (holding that a declaratory judgment sufficed where an injunction may have effectively required the judge to take over management of the program for distributing funds to student groups challenged on First Amendment grounds). For these reasons, the Court concludes that a declaratory judgment strikes the correct balance between Plaintiffs' First Amendment interests and Defendants' sovereignty as state and local law enforcement officials. See Doran, 422 U.S. at 931.

Plaintiffs in Martin claim that a permanent injunction is necessary because there are reasons to doubt that Defendants will comply with just a declaratory judgment. As evidence, they

point to the fact that Defendants continued to enforce Section 99 for eight years following the First Circuit's holding in Glik v. Cunniffe, 655 F.3d 78, 83 (1st Cir. 2011), "that the First Amendment protects the filming of government officials in public spaces." Further, they contend Defendants enforced Section 99 one time during the pendency of this litigation, even after the Court denied their motions to dismiss.

The Court is not persuaded that Defendants will not comply with its decision going forward. The Court has interpreted Glik "as standing for the proposition that the First Amendment protects the right to record audio and video of government officials, including law enforcement officers, performing their duties in public, subject only to reasonable time, place, and manner restrictions." Id. at 97-98. As a factual matter, though, Glik concerned recording done openly rather than secretly. See 655 F.3d at 79, 87. That Defendants read Glik narrowly in the past is not proof that they will continue to do so now that the Court has ruled. Defendants have stated they will follow this Court's ruling, and the Court will take them at their word. See No. 16-cv-11362-PBS, Dkt. No. 166 at 2. The Court "assume[s] that municipalities and public officers will do their duty when disputed questions have been finally adjudicated and the rights and liabilities of the parties have been finally determined."

Commonwealth v. Town of Hudson, 52 N.E.2d 566, 572 (Mass. 1943); see also McLaughlin, 140 F. Supp. 3d at 197 n.16.

Thus, the Court will not issue a permanent injunction and finds that a declaratory judgment is a sufficient remedy.

2. Scope of Declaratory Judgment

Defendants ask the Court to adopt a declaratory judgment that narrows the definitions of "public space" and "government official." As Defendants acknowledge, the Court concluded that it would leave "it to subsequent cases to define these terms on a better record." Martin, 340 F. Supp. 3d at 109. With respect to "public space" and "government official," in its December 10 order the Court specifically adopted the language that the First Circuit employed in Glik. See, e.g., 655 F.3d at 82 ("The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles."); id. at 83 ("Our recognition that the First Amendment protects the filming of government officials in public spaces accords with the decisions of numerous circuit and district courts."); id. at 84("Such peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation.") id. at 85 ("In summary, though not unqualified, a citizen's right to film government officials, including law

enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment."). Defendants' proposal that "public space" be defined as encompassing "traditional and designated public for[a]," then, is narrower than the plain language of Glik. And, while Defendants have proposed a list of persons that might qualify as a "government official," at this late stage in the proceedings the Court has no basis for evaluating whether it is an overinclusive or underinclusive list. The Court will not reconsider its December 10 order to give either "public space" or "government official" definitions.

Defendants also ask the Court to narrow its declaration so that Section 99 is still enforceable where a surreptitious audio recording captures the oral communications of both a government official and a non-government official (i.e., a civilian). Defendants contend that this limitation is necessary to protect the privacy interests of civilians (such as victims). However, in Glik, the plaintiff was arrested for recording several police officers arresting a man on the Boston Common. Id. at 79. The First Circuit found that the plaintiff had a First Amendment right to do so notwithstanding the fact that the recording also captured a civilian (i.e., the arrestee). See id. at 84. Moreover, the police retain discretion to impose reasonable restrictions.

In sum, Defendants have provided no basis for the Court to revise the declaration. In this respect, the Court denies Defendants' motion for reconsideration. See United States v. Allen, 573 F.3d 42, 53 (1st Cir. 2009).

DECLARATORY JUDGMENT AND ORDER

The Court declares Section 99 unconstitutional insofar as it prohibits the secret audio recording of government officials, including law enforcement officers, performing their duties in public spaces. This prohibition is subject to reasonable time, place, and manner restrictions. The Court orders that this declaration be provided to every police officer and to all assistant district attorneys within 30 days.

SO ORDERED.

/s/ PATTI B. SARIS
Patti B. Saris
Chief United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PROJECT VERITAS ACTION FUND
Plaintiff

CIVIL ACTION

V.

RACHAEL ROLLINS, in Her Official Capacity as District Attorney for Suffolk County
Defendant

NO. 1:16-cv-10462- PBS

JUDGMENT

SARIS, C.J.

Pursuant to the Court's Declaratory Judgment and Order dated May 22, 2019, it is hereby ORDERED that Judgment is entered in favor for Plaintiffs, and that this case be closed forthwith.

By the Court,

5/22/2019
Date

/s/ Miguel A. Lara
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

K. ERIC MARTIN and RENÉ PÉREZ
Plaintiffs

V.

WILLIAM GROSS, in His Official Capacity as Police Commissioner for the City of Boston, and RACHAEL ROLLINS, in Her Official Capacity as District Attorney for Suffolk County
Defendants

CIVIL ACTION

NO. 1:16-cv-11362- PBS

JUDGMENT

SARIS, C.J.

Pursuant to the Court's Declaratory Judgment and Order dated May 22, 2019, it is hereby ORDERED that Judgment is entered in favor for Plaintiffs, and that this case be closed forthwith.

By the Court,

5/22/2019
Date

/s/ Miguel A. Lara
Deputy Clerk